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FOREWORD

WITH this number *The Cambridge Law Journal* enters upon a new series. In future it will appear twice a year, in April and November, and will be published under the auspices of the Faculty of Law.

A new section, entitled " Case and Comment," contains reviews of recent cases and will extend in future numbers, it is hoped, to legislation and other materials of outstanding interest. In the present number enough space for this section has been difficult to find, since a whole year's harvest of cases has been garnered. In this number, therefore, the section has been confined to notes of cases only, and it has been allowed more space than is intended for the future. It is hoped that the notes, which will be written by specialists, will appeal to a wider public than the short notes which were formerly published, and that they will interest practitioners as well as students of the law.

For over thirty years *The Cambridge Law Journal* has been published in much the same form as the first number in 1921, when it was the only journal of its kind produced in the Law School of a University in the United Kingdom. This is then a proper occasion to pay tribute to the pioneer work of its founder, the present Master of University College, Oxford, Dr. A. L. Goodhart, who has also for over a quarter of a century edited *The Law Quarterly Review*, and to the long service as its Honorary Treasurer of the Vice-Master of Trinity College, Professor H. A. Hollond. Without their inspiration, guidance and material help the *Journal* would never have established itself. But it is above all

to the late Editor, Professor Sir Percy Winfield, who edited it for over twenty years, that the *Journal* owes its greatest debt. That it is now in a position to enlarge its scope is in no small measure due to the years of devoted service which he rendered from the editorial chair. A tribute to him will be found in a leading article in this number.

CASE AND COMMENT

COURTS—JUDGES IN COLONIAL TERRITORIES—TENURE OF OFFICE

By way of introduction, it is necessary to explain both the scope and the limitations of this note, which is prompted by the decision in *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482.

First, it is concerned with the Judiciary in territories which may conveniently be described together as those which are the concern of the Colonial Office. The words "Colonial territory" will be used to embrace not only Colonies but also Protectorates (including most Protected States), Trust Territories and composite territories, *e.g.*, Kenya, which contains a Protectorate as well as a Colony, and Nigeria which consists of a Colony, a Protectorate and a Trust Territory.

Secondly, some statements, though in general correct, would need qualification if this note were intended to be a detailed exposition of the position of the Judiciary in every one of the thirty or forty colonial territories concerned.

The Courts

In every colonial territory there exists a court of unlimited jurisdiction, established either by Order in Council or by local statute. In a territory which is or includes a colony, this court is styled the Supreme Court, while in other colonial territories it is called the High Court. The origin of this difference in designation and the reason for it are obscure, but it is of no practical importance, and for the sake of brevity it will be convenient to use the term "Superior Court" as meaning both a Supreme Court and a High Court.

Between the Superior Court and the Judicial Committee of the Privy Council, which is, of course, the ultimate Appellate

Tribunal for colonial territories, facilities for appeal vary. In some territories where there is a sufficient cadre of judges, there is a local Court of Appeal consisting of judges of the Superior Court. In some areas there are Regional Courts of Appeal. Thus, for the majority of colonies in the Caribbean area, there is the West Indian Court of Appeal, established by the West Indian Court of Appeal Act, 1919; for Nigeria, the Gold Coast, Sierra Leone and the Gambia there is the West African Court of Appeal, constituted under the West African Court of Appeal Order in Council, 1948; and the Eastern African Court of Appeal, provided for by the Eastern African Court of Appeal Orders in Council, 1950 and 1953, hears appeals from Kenya, Uganda, Tanganyika, Zanzibar, Aden and the Somaliland Protectorate. (The extension of the jurisdiction of the Court to Seychelles is provided for by the Orders in Council but has not become effective.)

In two cases there are Regional Supreme Courts as well as Courts of Appeal. A single Supreme Court and a Court of Appeal, established by the Leeward Islands and Windward Islands (Courts) Orders in Council, 1939 and 1949, exercise jurisdiction in the four colonies in the Windward Islands and in the colony of the Leeward Islands. Similar provision for a Supreme Court and a Court of Appeal is made by the Sarawak, North Borneo and Brunei (Courts) Order in Council, 1951, for the Colonies of Sarawak and North Borneo and the Protected State of Brunei.

Appointment of Judges

The judges of Superior Courts are appointed by the Governor (or other officer administering the Government of the territory), on instructions from the Sovereign given through, and on the recommendation of, the Secretary of State.

At one time it was not unusual for judges of the Superior Courts to be appointed directly from the Bar in England, Scotland or Ireland, but since the establishment of a Colonial Legal Service, if not, indeed, earlier than that, such appointments have been very rare. Some appointments have been made direct to the Bench from the local Bar, but the great majority have been made within the Colonial Legal Service, either from courts of inferior jurisdiction or from Crown Law Officers.

Jurisdiction

The jurisdiction of a judge in a colonial territory is as wide as that of a High Court Judge in England, and, in practice, his experience in course of time is likely to be wider, since the work

of a Superior Court is not subject to the restrictions in this country represented by Divisional functions. A judge in a colonial territory may, therefore, find in his list cases which in England would go to the Queen's Bench Division, the Chancery Division or the Probate, Divorce and Admiralty Division; and he will, of course, frequently sit at Criminal Assizes. In brief, to use the words of the Tanganyika Order in Council, 1920, the court (which means every judge of the High Court) has jurisdiction over all persons and all matters arising within the territory. This is subject to the qualification that in certain territories there are Moslem Courts or other native courts, which exercise original and appellate jurisdiction in matters involving Moslem law or native law and custom, and sometimes in certain other matters. The Superior Court of the territory usually, but not invariably, has authority over these courts by one (or both) of two methods: by way of appeal or by the exercise of revisionary jurisdiction—that is to say, the power to alter a judgment of the inferior court irrespective of any appeal by a party to the proceedings. The Superior Court is also invariably a Court of Appeal or revision (or both) in civil and criminal cases heard in other courts of inferior jurisdiction in the territory.

Tenure of Office

In the matter of tenure of office, the legal position does not fully reflect the facts. In law, a judge in a colonial territory holds office during Her Majesty's pleasure. The Letters Patent or other instrument constituting the office of Governor confer upon him several powers, including authority to appoint judges and officers, all of whom are, unless otherwise provided by law, to hold office during Her Majesty's pleasure. The instrument appointing a judge is framed accordingly. It is also laid down in Regulation 21 of Colonial Regulations that appointments to public offices are held during Her Majesty's pleasure. In addition a provision is commonly found in colonial pensions laws enabling the Governor to require officers (including judges) to retire at any time after attaining a specified age, fixed in the light of climatic and other local conditions.

The principle that a colonial judge holds office at pleasure was called in question in *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482. The claimant held the office of judge in the Straits Settlements when the colony was overrun by the Japanese. He was informed that the Secretary of State could find no suitable legal post for him and, as he declined to ask leave to retire, his

appointment was terminated. It was argued on his behalf that he was protected by section 3 of the Act of Settlement (now superseded by section 12 of the Supreme Court of Judicature (Consolidation) Act, 1925), whereby judges in England held office during good behaviour and could be removed on an address by both Houses of Parliament. Lord Goddard C.J. expressed the opinion that this enactment is wholly inapplicable to a colonial judge and held that Mr. Terrell held office at the pleasure of the Crown. In the course of his judgment, he demonstrated that the great majority of judicial personages in England do not enjoy the exceptional position of judges of the Supreme Court in England and observed that "it is not fundamental to the office of a judge that he should possess the immunity with which it was found necessary to clothe the judges of the Supreme Court by reason of what was considered the undue subservience of the judiciary in the time of the Stuarts towards the Sovereign." It was also argued that the correspondence which took place before Mr. Terrell's acceptance of his appointment attached to it a contractual term that he would not be called upon to retire before reaching the age of 62, but Lord Goddard held that the correspondence did not amount to an agreement and that in any case a contractual arrangement could not take away the Crown's right to dismiss at pleasure.

In practice, however, a colonial judge would not be dismissed on the *ipse dixit* of the Executive. A convenient starting point for a review of the actual position is the "Memorandum of the Lords of the Council on the Removal of Colonial Judges" which forms an Appendix to 6 Moore (N.S.) (1870). The Memorandum, drawn up in pursuance of a request from the Secretary of State for the Colonial Department, explained the views of the Lords of the Judicial Committee on the subject "as far as they may be gathered from reported cases, and from the experience of the last thirty years." The first conclusion stated in the Memorandum is in the following terms: "It is obvious that some effectual means ought to exist for the removal of colonial judges charged with grave misconduct, and that these means ought to be less cumbrous than those existing for the removal of one of Her Majesty's judges in this country. The mode of procedure ought to be such as to protect judges against the party and personal feelings which sometimes sway colonial legislatures, and to ensure to the accused party a full and fair hearing before an impartial and elevated Tribunal." The Memorandum makes no specific recommendations, but its general effect is to favour proceedings by the Governor subject to review by the Secretary of State or the Privy Council.

The Memorandum concludes, however, with the observation that when the misconduct charged is purely judicial "it would seem that the due maintenance of the independence of judges requires that judicial acts should only be brought into question before some Tribunal of weight and wisdom enough to pronounce definitely upon them, and this function appertains with peculiar fitness to the Privy Council, which, as a Court of Appeal, has to review the decisions of the colonial courts." As the Memorandum points out, if a judge is "amoved" under the Colonial Leave of Absence Act, 1782, he has a right of appeal under that Act to Her Majesty in Council.

In a circular dispatch dated July 26, 1929, the Secretary of State informed the Governors of colonial territories of conclusions at which he had arrived in regard to the principles which should govern the investigation of serious charges of misconduct, whether in a judicial capacity or otherwise, against Judicial Officers. The first of these, confirming what this dispatch stated had been the practice since 1870, was that the dismissal of a judge of the Supreme Court (or High Court) would in every case be made the subject of a special reference by the Secretary of State to the Judicial Committee of the Privy Council. The reference would presumably be under section 4 of the Judicial Committee Act, 1833.

Finally, this decision is now reflected in Regulation 63 of the Colonial Regulations, which lays down that, while charges of misconduct are to be investigated in the first place by a Judicial Commission set up in the territory, any question of the dismissal of a judge or of inflicting any other penalty upon him will be referred by the Secretary of State to the Judicial Committee, unless the judge requests that it should not be so referred.

Whilst, therefore, in law a judge in a colonial territory holds office at pleasure, in fact his tenure is firmly secured by administrative instruction and regulation.

This does not mean that a judge is free to remain in office indefinitely. Reference is made above to the enactments which empower a Governor to require officers to retire at any time after attaining a specified age. This age is usually 50 or 55. In practice, however, there is a special arrangement by which this power is not normally exercised in the case of judges until they reach the age of 62. In a circular dispatch dated September 20, 1928, the Secretary of State informed Governors that he had decided that judges should be required to retire at the age of 62, unless the tenure of appointment in an exceptional case were continued, with the specific sanction of the Secretary of State, for a period not exceeding three years. There must obviously be exceptions to this

ruling. The dispatch itself refers to two—ill-health and judicial misconduct. It was clearly not regarded as preventing the Secretary of State from insisting upon retirement in the case of Mr. Terrell, the circumstances of which were, of course, quite exceptional. Further, if, say, in consequence of judicial reforms a number of judges became redundant and their offices were abolished, it could hardly be claimed that they should be permitted to continue to hold their appointments and draw their salaries, even though their services were no longer required. Such an event would doubtless be very rare, but it is not impossible.

In short, subject to obvious exceptions—ill-health, misconduct and very special circumstances which make it patently impracticable for him to continue to perform his functions—a judge in a colonial territory may, if he wishes, continue in office until he attains the age of 62; he is then required to retire.

(*The above note was very kindly supplied by a learned contributor who does not wish to append his name.*)

COURTS—PROCEDURE—RETIREMENT OF CLERK WITH JUSTICES

BETWEEN May, 1952, and December, 1953, the Divisional Court of the Queen's Bench Division has on five occasions concerned itself with the retirement with justices of justices' clerks:

R. v. *East Kerrier Justices* [1952] 2 Q.B. 719;
R. v. *Welshpool Justices* [1953] 1 W.L.R. 1320;
R. v. *Barry (Glamorgan) Justices* [1953] 3 W.L.R. 583;
Practice Note (Justices' Clerks) [1953] 1 W.L.R. 1416;
Ex p. How [1953] 1 W.L.R. 1480.

In the first of the recent cases, the *East Kerrier* case, the Divisional Court quashed a conviction for driving without due care and attention. The clerk to the justices who had retired with them returned to court, after the justices had decided to convict, in order to fetch a certificate of a previous conviction of the accused for a similar offence. There had been no previous announcement in open court of the decision to convict. Lord Goddard C.J. said: "As a general rule it will invalidate a conviction if evidence is given or appears to be given to justices other than in open court, because the defendant has no means of dealing with it." The case could have been decided and, indeed, was decided on this ground alone, but Lord Goddard went on to say: "I think that it has been said more than once in this court that it is not right that the justices' clerk should retire with them. It has been often said

that the decision must be the decision of the justices, not the decision of the justices and their clerk, still less the decision of the clerk; and if the clerk retires with the justices, the inevitable conclusion that people will form is that he may influence the justices or may take some course which it is for the justices alone to take. Justices can always send for the clerk if they require advice on a point of law, because that is what the clerk is there for; but it is not desirable, and is irregular, for a clerk to retire with justices as a matter of course when they are considering the facts. If they want his advice, they should send for him from the court, where he should remain until the justices either return into court or send for him. I need not say whether we should have quashed the conviction on the ground that the justices' clerk retired with them. We think that it is undesirable, and we hope in future that justices' clerks will not retire with their bench; they should only go if the justices require their advice." Lord Goddard's remarks may, perhaps, technically, be regarded as *obiter* but they were weighty and disturbing to justices as reflecting upon a very general practice of the retirement of clerks with their bench.

Three months later, in the *Welshpool* case, the Divisional Court refused to quash a conviction where the clerk retired with the justices. Several legal points had arisen during the course of the hearing and the justices requested the clerk to retire with them. The clerk remained in the retiring room after the legal points had been disposed of while the justices considered the facts. Lord Goddard explained the *East Kerrier* case and made it clear that justices could ask their clerk to retire with them whenever they needed his advice on a point of law. The fact that the clerk remained in the room while the justices discussed the facts was not itself a sufficient objection to invalidate the justices' decision. Lord Goddard pointed out that it is often difficult to disentangle what is purely a question of law from a question of fact. He also made it clear that justices may send for their clerk's note of evidence when they require to refresh their memory. He closed his judgment with the words : " Justices will, I feel sure, recognise that it is their duty to obey a direction of this court not only in the letter but in the spirit, and that they are not to get round the direction which was given in the *East Kerrier* case merely by pretending that they require the presence of their clerk to advise them when there is nothing but fact to be considered."

In the third case, *R.* v. *Barry Justices*, a conviction was quashed on the ground of the retirement with justices of their clerk. Before the justices retired, counsel for the accused asked that the

clerk should not retire with the justices. The accused had been previously before a court where the same clerk had been sitting. Lord Goddard did not, in giving judgment, confine himself to these special facts. He drew the inference from the affidavits that the clerk always retired with the justices and that the directions of the court had been flouted. He stated that only on a point of law are justices entitled to take the advice of their clerk. "On a point of fact, it is essential that the public should be able to see and to understand that the decision is the decision of the justices and of nobody else." He repeated the well-known maxim: "It is important to bear in mind that justice must not only be done, but must be manifestly seen to be done."

The three cases just discussed left lawyers puzzled and justices disturbed. The leading authority for the proposition that justice must be manifestly and undoubtedly seen to be done is the judgment of Lord Hewart C.J. in *R.* v. *Sussex Justices, ex p. McCarthy* [1924] 1 K.B. 256. In that case the Divisional Court quashed a conviction for dangerous driving because the acting clerk who retired with the justices was a partner in a firm of solicitors which was concerned in a civil action arising out of the facts which were the subject-matter of the charge. The affidavits referred to the retirement of the clerk in the usual way taking with him the notes of the evidence in case they should be required, or in case the justices should desire to be advised upon any point of law. The court expressed no disapproval of this usual practice, but based their judgment solely upon the peculiar position of the particular acting clerk. In 1944 the Departmental Committee on Justices' Clerks, presided over by Lord Roche, a Lord of Appeal who was an experienced common lawyer, stated in their report: "We however regard it as entirely proper and natural that justices may wish their clerk to retire with them, but this is a matter for the discretion of the justices, and it is only on their request that their clerk may accompany them. . . . We think the true conclusion is this: that if the relationship of bench and clerk has been properly regulated in court, there will be no good grounds for criticising the clerk's retirement with the justices." What was apparently proper in 1924 and 1944 was criticised by the Divisional Court in 1953 as preventing justice from seeming to be done.

Many benches were disturbed at being restricted in the use they might make of their clerk. It is frequently only in the retiring room that it is realised, because of the clerk's advice, that what appears a simple point of fact involves a point of law. The clerk can be invaluable during a discussion of fact in drawing attention to a point of evidence which has been overlooked. Is it more

important that justice should be seen to be done than that it should be done?

In November, 1953, Lord Goddard made a statement with reference to the three cases. His statement was made with the authority of the Lord Chancellor. Justices may seek their clerk's advice on questions of law or of mixed law and fact and also on questions of practice and procedure. They may ask for information as to sentences imposed by their own or neighbouring benches in respect of similar offences. The clerk may himself call the attention of the justices to the fact that a question of law does or may arise. They may in no circumstances consult their clerk on guilt or innocence of the accused so far as it is simply a question of fact. They may consult their clerk as to whether the facts found by them constitute an offence. They may ask their clerk to refresh their memory as to any matter of evidence which has been given. They may take with them or send for any note which the clerk may have taken, and if there is anything in the note which needs elucidation they may consult him. They must not ask his opinion as to the sentence which they ought to impose, but they may ask for information as to the sentences imposed for comparable offences and of course as to the penalties which the law allows in any particular case. A clerk should not retire with his justices as a matter of course, nor should justices attempt to get round the decisions of the Divisional Court by asking the clerk to retire in every case or by pretending that they require his advice on a point of law. Subject to this, it is in the discretion of justices to ask their clerk to retire with them if in any particular case it has become clear that they will need his advice. If in the course of their deliberations they find that they need him, they can send for him. If the clerk does retire with the justices or is sent for by them, he should return to his place in court as soon as he is released by the justices, leaving them to complete their deliberations in his absence and to come back into court in their turn.

The question of a clerk's retirement with justices came before the Divisional Court again in *Ex p. How*. The court refused to quash a conviction for a motoring offence where the clerk had retired with the justices, after the chairman had been heard in court to say to the clerk "Dismissed" and the clerk had replied inaudibly. Lord Goddard said: "It should be understood that the court will not always quash convictions merely because justices have not followed the recent direction which the court has given. . . . It is not to be thought that every defendant who has been convicted when the clerk has retired with the justices can come to this court and get the conviction quashed."

The statement of November, 1953, laid down nothing about demarcation of spheres of function which affects the practice observed by competent magistrates and competent clerks. So far as procedure is concerned it is perhaps a pity that magistrates may be deterred from requesting their clerk to retire with them where, although the facts are complicated, no point of law is apparent. As has been pointed out, a good clerk can without any usurpation of the duties of the magistrates be most useful in drawing attention to points of evidence. Though a clerk may properly draw the attention of magistrates to the existence of a point of law, it will be difficult for him to suggest that he retires with them merely because the facts are complicated and he thinks he may be useful. It is difficult to see any great advantage in the direction that the clerk should return to court before the magistrates have completed their deliberations.

G. Godfrey Phillips.

CROWN PROCEEDINGS—EVIDENCE—REFUSAL OF DISCOVERY

When Lord Simon L.C. delivered judgment on behalf of himself and six other concurring members of the House of Lords in *Duncan* v. *Cammell, Laird & Co., Ltd.* [1942] A.C. 624, he upheld an objection taken by the Admiralty to the production of documents which included the contract for the hull and machinery of a submarine and a large number of plans and specifications which related to various parts of the vessel. The action was between the personal representatives of two men who had lost their lives in a submarine disaster and the contractors who had built the vessel. It was in these circumstances that there was propounded the rule that discovery of documents could be refused on the ground of injury to the public interest, provided that the decision to object was taken by a Minister (or in his absence the permanent head of a Department) as the head of the Department on his personal responsibility. Such objection may be to disclosing the contents of a particular document or on the ground that the document belongs to a class which by reason of the public interest must as a class be withheld from production (at p. 636). As is well known, this rule was enacted by section 28 of the Crown Proceedings Act, 1947; no attempt, however, was made to define the scope of the public interest.

In *Ellis* v. *Home Office* [1953] 2 Q.B. 135, an action maintainable under section 2 of the Crown Proceedings Act was brought by a prisoner on remand, by name Ellis, against the Home

Office on account of injuries received by him while detained in Winchester Prison in July, 1949, as the result of an attack upon him by Hammill, a fellow prisoner, who was under observation as a possible mental defective. The action was brought against the Home Office because the Home Secretary is the Minister responsible in law as well as to the House of Commons for the Prison Commissioners. Ellis sued for negligence on the part of prison officers or, alternatively, for a breach of duty which was owed to him under the Prison Rules; the action failed on the latter ground and, therefore, to succeed the plaintiff had to establish negligence in those responsible for the management of the prison. This he failed to do, but it may well have been because he was disabled from testing the evidence as to his assailant's behaviour. Relying on section 28 of the Crown Proceedings Act, the Home Secretary declined to produce either the police or the medical reports on Hammill. The whole issue turned upon the question whether the prison medical officer had any reason to believe that Hammill was a person likely to commit acts of violence of the same nature as his attack on Ellis. But the medical officer's opinion could not be tested in cross-examination by reference even to the routine hospital reports on the man, on account of the refusal by the defendant to produce these reports. Other documents for which the privilege was claimed included reports on Hammill submitted to the local Chief Constable by his police officers, who had been called to the prison to investigate Hammill's assault on Ellis, the Standing Orders for the Government of Prisons, and a statement made at the time of the assault by another prisoner, Hutton. This statement was relevant because Hutton was called as a witness at the trial of this action three and a half years later. In the case of this document alone permission was obtained from the Home Office for it to be shown to Ellis's counsel, but even this necessitated the adjournment of the sitting of the Court of Appeal. There was, in fact, in the document "nothing which could affect the public interest in any degree" (*per* Singleton L.J., at p. 141). All four judges who heard the case argued expressed anxiety lest the undisclosed evidence about Hammill's behaviour might have prejudiced the plaintiff's case.

It will be agreed that the conception of injury to the public interest is a subject capable of the widest interpretation, whether applied to individual documents or a particular classification of documents held by a Government Department. In the latter case, it would seem that failure to produce a document on the ground that it belongs to a class of documents which the Minister deems it to be against the public interest to produce might turn as much

on the departmental filing system as on ministerial discretion. A Minister, as in this case, may rule that the dossier of a prisoner should be withheld because it is concerned solely with matters which relate to the treatment of the prisoner in the hands of the Commissioners, who are responsible for carrying out the sentence upon him. It is not difficult to agree that such matters should be kept completely confidential. But if the dossier, as in the instant case, contains material which is vital to the establishment of the legal rights of a third party, it is difficult to see what public interest is served by withholding such material from the court. The result may well be the denial of justice which, as Morris L.J. pointed out at p. 147, is itself contrary to the public interest. This aspect of *Ellis's* case suggests that refusal to produce one of a class of documents which ought not in the public interest to be produced may well result in individual documents not even being examined by the Minister who is taking advantage of the rule; once the decision is taken to classify a document, it would seem that it need not again be examined for the purpose of considering whether it contains matter which ought in the public interest to be withheld. In other words, the Home Secretary can lay down once and for all that it is against the public interest to produce a dossier of a prisoner or a copy of the Prison Rules. This seems a very long way from the cases of public interest which Lord Simon had in mind when he spoke of the public interest being damnified " where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping the class of documents secret is necessary for the proper functioning of a public service " ([1942] A.C. at p. 642). It is clearly not necessary for such functioning to deprive an injured man of the means of successfully suing his assailant just because both, through their default or misfortune, happen to be inmates of a prison.

A suggestion was made in the Court of Appeal in *Ellis's* case (at p. 146), that whoever represented the Department in court should be given authority to consider questions of privilege if and when they arise in the course of the hearing. But the real safeguard at present is that a Minister must personally testify by affidavit that it is necessarily in the public interest to refuse to produce a particular document or class of documents. It is difficult to see how the representative of a Department could differ from his Minister's considered opinion.

While it is perfectly true that administration would be seriously hampered if departmental files were liable to be made public in litigation, it is very difficult to see what public interest is served by objecting to a particular document, one vital to the point in

issue before the court, because it has found its way into a class of documents which are not normally disclosed. In the result a decision of the House of Lords given in time of war when defence considerations were paramount may have operated to deny justice to an unhappy prisoner on remand who, whatever the merits of the charge against him, could not lawfully have been assaulted in prison even by a mental defective. Section 28 of the Crown Proceedings Act, so far from enlarging the liability of the Crown, offers it a protection which may very well deny justice to the subject.

E. C. S. Wade.

ADMINISTRATIVE LAW—NATURAL JUSTICE—RIGHT TO A HEARING

The twilight of natural justice has been in no way dispelled by *R.* v. *Metropolitan Police Commissioner* [1953] 1 W.L.R. 1150. The actual decision of the Divisional Court may be logical, for the language of the Order under consideration, authorising the revocation of a cab-driver's licence by the Commissioner "if he is satisfied, by reason of any circumstances arising or coming to his knowledge . . . that the licensee is not a fit person to hold such a licence," may seem to exclude any implication that a hearing was intended. It is true that in the case in question a mistaken impression might have been created that the Commissioner nevertheless purported to act in accordance with natural justice. He gave instructions that the driver should be brought before the departmental licensing committee and confronted with the police constables who were his accusers. The Commissioner stated in an affidavit, however, that he had already decided to revoke the licence unless anything transpired before the committee which might lead to a reconsideration. It was accordingly held that the committee were not meant to conduct a judicial inquiry, and hence not obliged to hear a witness whose evidence conflicted with that of the constables. Parker and Donovan JJ. considered that the position might have been otherwise had the Commissioner deferred forming an opinion until the committee had inquired and reported. Such a distinction might introduce undesirable refinements into the law of natural justice; but in any event it is unlikely that, if the Commissioner were fully informed of the procedure at an inquiry and chose to act on the committee's report, the licensee would have any legal ground for complaining of defects in the committee's procedure.

The more unexpected features of the case are certain dicta in

the judgment of the Lord Chief Justice. Thus, a distinction is there drawn, for the purpose of determining whether certiorari will lie, between an order or resolution and a mere decision. It is suggested (at p. 1155), that a decision to revoke a licence, although confirmed by letter,[1] could not be brought up and quashed. To attach importance to the precise form taken by an exercise or alleged exercise of a statutory power, rather than to the substance of the decision, would seem not wholly in accord with *R.* v. *London County Council*.[2] There the Court of Appeal held that a resolution to take no action for the present in the event of a cinema being opened on Sundays could be quashed, because in reality the council had decided to grant unlawful permission for Sunday opening.

On the other hand, the New Zealand Court of Appeal, after examination in judgments and arguments of authorities drawn from a number of Commonwealth jurisdictions, has found it possible to make a constructive contribution to the subject of natural justice. In *New Zealand Dairy Board* v. *Okitu Dairy Co., Ltd.* [1953] N.Z.L.R. 366, the Board was empowered by regulations to confer on any manufacturing dairy or dairies the exclusive right to receive cream for making into butter from supplying dairies in any area. An order of 1937 had assigned a certain zone to the Okitu Company and the Kia Ora Company. In 1950, on application by the Kia Ora Company, the Board made a new order assigning that zone to the latter company only, an order that would have destroyed (subject to compensation) the Okitu Company's butter manufacturing business. This order was preceded by negotiations, including a meeting of representatives of the Board and the two companies, on the subject of certain grievances of the Kia Ora Company. Nevertheless, it was found as a fact that the Okitu Company was not informed that the Kia Ora Company had requested, and the Board was contemplating, the drastic order finally made. As the secretary of the Board explained in evidence,[3] " one was liable to get into trouble by saying too much." Hence the Okitu Company had been denied a hearing on the crucial issue.

By an ultimate majority of four judges (Northcroft, Finlay and Cooke JJ. in the Court of Appeal and Hay J. at first instance) to two (O'Leary C.J. and Hutchinson J., the dissentients in the Court

[1] *Ibid.*, at p. 1151. It is hard to imagine that any such decision would be taken without some record of its being made; and indeed paragraph 30 (2) of the London Cab Order, 1934, requires the Commissioner to cause notice of revocation to be given to the licensee.
[2] [1931] 2 K.B. 215; 144 L.T. 464.
[3] *Ibid.*, p. 374.

of Appeal), the Board was held to have been bound to grant such a hearing. In substance the view of the majority was that, as is indicated in *Nakkuda Ali* v. *Jayaratne*,[4] a duty to act in accordance with natural justice may be implied either by the actual terms in which the power in question is conferred or by "the context or conditions" of the jurisdiction. The zoning regulations contained no language imposing such a duty. Indeed, although one clause recognised that the Board might undertake inquiries, it seems fair to say that there was nothing to show decisively that the draftsman had intended to provide any guidance on the point at issue. Where, however, the Board was faced with a contest between two parties in a matter of great moment to both, the conditions in which the zoning power fell to be exercised led to the inference that a quasi-judicial inquiry must be held. The power and the situation together inevitably involved the Board in adjudication on a form of *lis*. The Ceylon case was accordingly distinguishable. The minority judgments reach the opposite result chiefly by reason of the absence from the bare words of the regulations of a positive indication that an inquiry was intended.

All the members of the Court of Appeal were agreed that the problem in a case of this kind is basically one of construction. Since it is not the practice of legislators in terms to impose or delimit obligations to follow the rules of natural justice, since to do so would be in truth a most difficult drafting task in view of the elasticity of the rules and the variety of circumstances in which they may be relevant, the work of construction must often be largely creative. A decision as to whether or not the rules apply may depend on ascertainment of the solution that would best accord with the purposes of the legislation as a whole. Here much can turn on individual differences in approach, and it is not surprising that, as is pointed out in the majority judgments in the *Dairy Board* case, even decisions of the House of Lords and the Judicial Committee seem to show some inconsistency. It also follows that no attempt to state general propositions as to when the rules apply can be more than tentative; but unless such attempts are made from time to time the law relating to natural justice will become almost entirely devoid of certainty.

Accordingly it is tentatively suggested that the authorities at present justify certain propositions concerning the rule *audi alteram partem*. At the outset, three further caveats should be entered. First, such propositions can be no more than prima facie rules of construction, liable to displacement by clear signs of a contrary

[4] [1951] A.C. 66, 78–9.

intention. Secondly, they relate only to whether a duty to hear exists, and not to what such a duty entails. As Lord Parmoor said in delivering the judgment of the Judicial Committee in *De Verteuil* v. *Knaggs*[5]: "The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated." Thirdly, they relate only to the duty to hear and not to the rule against bias. The extent to which an interest in a dispute or preconceived opinions are a disqualification plainly varies from case to case and is vitally affected by the nature of the other powers and duties of the authority.[6] The obligations connoted by the term quasi-judicial are by no means uniform.

Prima facie a duty to afford a hearing to persons liable to be prejudicially affected is implied:

(a) By the use in the legislation defining the relevant power of language commonly having curial associations. An obvious instance is *Smith* v. *The Queen*[7] (Commissioner of Crown Lands to "sit" at a certain place, and "All questions shall be decided by the Commissioner who shall give his decision in open court, subject to confirmation by the Governor in Council"). Other instances are *De Verteuil* v. *Knaggs*[8] (power to transfer indentures of immigrants "If at any time it appears to the Governor, on sufficient ground shown to his satisfaction" that they should be removed from plantations); *Wilson* v. *Esquimalt and Nanaimo Ry. Co.*[9] (Lieutenant-Governor to issue Crown grants upon "reasonable proof" of certain matters); and *F. E. Jackson & Co., Ltd.* v. *Price Tribunal*[10] (various indications, including the terms "tribunal" and "sitting" and reference to the matters before it as "cases").

(b) If there is power conclusively to decide questions of law and fact, and hence to ascertain existing rights rather than create new ones. This principle seems to underlie *Spackman* v. *Plumstead Board of Works*[11] (decision of architect of Metropolitan Board of Works as to the general line of buildings in any street conclusive for the purposes of a prosecution) and to be supported by *R.* v. *Manchester Legal Aid Committee*,[12] where the committee were held

[5] [1918] A.C. 557, 560. For a recent decision on the right to reply to statements made by an opponent see *Connolly* v. *Palmerston North City Council* [1953] N.Z.L.R. 115, where Fair J. adopts the analysis of quasi-judicial powers contained in Mr. H. W. R. Wade's article in 10 C.L.J. 216.

[6] *Panamena Europea Navigacion* v. *Frederick Leyland & Co.* [1947] A.C. 428; *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87.

[7] (1878) 3 App.Cas. 614.

[8] [1918] A.C. 557.

[9] [1922] 1 A.C. 202.

[10] [1950] N.Z.L.R. 433.

[11] (1885) 10 App.Cas. 229.

[12] [1952] 2 Q.B. 413.

bound to act judicially because bound to decide solely on the facts of each particular case, solely on the evidence before them and apart from considerations of policy. It is true that the latter case was not directly concerned with natural justice, and that the secrecy provisions of section 14 of the Legal Aid and Advice Act, 1949, might indeed be said partially to deny natural justice to an applicant's opponent; but, such special provisions aside, if a body is amenable to certiorari because it performs functions of the kind characteristically performed by courts, the duty to hear will normally be concomitant.

(c) If an exercise of the power involves the destruction or demolition of property. There are many old cases illustrating this principle, the best known being *Cooper* v. *Wandsworth*.[13] Twentieth-century illustrations are *Sydney Corporation* v. *Harris*[14] in the High Court of Australia and *Urban Housing Co., Ltd.* v. *Oxford City Council*[15] in the English Court of Appeal. No doubt it is illogical that the principle should not extend, for instance, to withdrawal of a licence to trade. While *Nakkuda Ali's* case stands, however, the distinction must be made[16]; and perhaps it may be justified in some sort by the irretrievable consequences of physical destruction.

(d) If the power is vested in an authority that ordinarily acts as a court or tribunal. Many of the most sweeping judicial statements of the scope of natural justice, at first sight inconsistent with *Nakkuda Ali* v. *Jayaratne*, have been made in cases of this kind. As the Judicial Committee said in the Ceylon case,[17] "It is probably true to say that the courts have been readier to issue the writ of certiorari to established bodies whose function is primarily judicial, even in respect of acts that approximate to what is purely administrative, than to ministers or officials whose function is primarily administrative even in respect of acts that have some analogy to the judicial."

(e) In cases where common law or equity requires of a man a particularly high standard of conduct. Thus, where partners have power to expel one of their number, the authorities show that, in Pollock's words,[18] "In ordinary cases of expulsion, the conditions

[13] (1863) 14 C.B.(N.S.) 180.
[14] (1912) 14 C.L.R. 1.
[15] [1940] Ch. 70.
[16] It is also possible to limit the operation of that decision by making a distinction, pointed out in the *Dairy Board* case at pp. 416–7, between withdrawal of a privilege conferred by a licence and restriction by zoning or other order of a liberty existing at common law.
[17] [1951] A.C. 66, 78.
[18] *Partnership*, 15th ed. (1952) 79.

of good faith include a reasonable preliminary warning and an opportunity of explanation." Similarly, trustees may be held to fall short in their duties if they fail to conduct proper inquiries: see the judgment of Lord Langdale M.R. in *Willis* v. *Childe*.[19]

(f) In arbitrations (see *Re Carus Wilson and Greene* [20]) and cases where one immediate object in exercising a power is to settle a dispute between specific parties. The *New Zealand Dairy Board* case may be placed under this head. The same principle appears to underlie Scrutton L.J.'s well-known description of judicial functions in *R.* v. *London County Council*.[21]

(g) If an exercise of the power involves a final decision that a man has been guilty of discreditable conduct. Although perhaps demanded by natural justice more plainly than any of the preceding propositions, this must be advanced even more cautiously; for it was held in *Nakkuda Ali's* case that cancellation of a licence "where the controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer," need not be preceded by a hearing. It may be possible, however, to distinguish that case. The decision of the Controller was not final because, as the Judicial Committee held, there must in fact (in the opinion of the court) have existed such reasonable grounds, known to the Controller, before he could validly exercise the power. It would not necessarily be inconsistent to apply to powers of conclusive condemnation the principle so often regarded as basic in the past.[22] Whether the distinction will be drawn may turn on which of two considerations carries more weight with the judge. Lord Kenyon C.J. said, ". . . every man ought to have an opportunity of being heard before he is condemned; and I should tremble at the consequences of giving way to this principle." [23] Lord Goddard C.J. has said: "Where a person, whether he is a military officer, a police officer or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that would interfere with the free and proper disciplinary exercise of the powers that it may be expected he would otherwise use." [24]

R. B. Cooke.

[19] (1851) 13 Beav. 117.
[20] (1886) 18 Q.B.D. 7.
[21] [1931] 2 K.B. 215, 233. See also *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, 39–40, 45; *R.* v. *Statutory Visitors to St. Lawrence's Hospital, Caterham* [1953] 1 W.L.R. 1158, 1162.
[22] *E.g.*, *Bonaker* v. *Evans* (1850) 16 Q.B. 162; *Wood* v. *Woad* (1874) L.R. 9 Ex. 190.
[23] *R.* v. *Gaskin* (1799) 8 T.R. 209, 210.
[24] *R.* v. *Metropolitan Police Commissioner* [1953] 1 W.L.R. 1150, 1155.

PUBLIC INTERNATIONAL LAW—FOREIGN LEGISLATION ENACTED IN VIOLATION OF INTERNATIONAL LAW—EFFECT IN ENGLAND

SINCE the decision of the Court of Appeal in *Luther* v. *Sagor* [1921] 3 K.B. 532, it has been regarded as an unquestioned principle of English law that courts will not examine or question the validity of legislative acts of a recognised foreign State, at least in so far as they affect title to property within the territory of that foreign State. That principle was considered in *Luther* v. *Sagor* to follow from an international obligation binding upon this country. This was also believed to be the attitude of the courts of the United States in a number of decisions relied upon in *Luther* v. *Sagor*. Yet a British court, sitting in Aden in 1953, held that as the Iranian Oil Nationalisation Law amounted to expropriation without compensation, it was contrary to international law; that the court must refuse validity to that law in so far as it related to nationalised property of the plaintiffs within its territorial jurisdiction; and that, therefore, the oil in dispute was still the property of the plaintiffs, the Anglo-Iranian Oil Company: the *Rose Mary* [1953] 1 W.L.R. 246. Notice of appeal was lodged.

At the time of writing the question is *sub judice* and only some tentative observations are appropriate. The main question is to what extent, if any, the judgment in the *Rose Mary* departs from the wide principle laid down in *Luther* v. *Sagor*. Some of the judgments in the latter case were couched in general and emphatic terms and on a number of occasions it has been found necessary, in judicial decisions and elsewhere, to explain or to qualify their apparent comprehensiveness.[1] It is possible that some such qualification, which may prove not to be inconsistent with the basic principle of *Luther* v. *Sagor*, underlies the decision in the *Rose Mary*. The reason for that may be found in the following statement in Sir Arnold McNair's *Legal Effects of War*, 3rd ed., 1948, at p. 322, where he says: "It is usual for our courts to give effect to the acts of foreign Governments within the sphere of their competence, subject to certain exceptions such as penal, revenue and political laws and *provided that these acts do not conflict* with rules of international law." The words as here italicised seem to indicate that the general principle in *Luther* v. *Sagor* does not apply—and probably was not intended to apply—to such legislative acts of foreign States as are contrary to international law. In *Luther* v. *Sagor* there was no allegation that the confiscatory Soviet

[1] *Sa Haile Selasse* v. *Cable and Wireless Ltd.* (*No.* 2) [1929] Ch.D. at pp. 187–194. And see Sir Arnold McNair's observations on *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* [1937] Ch. 513, in *Legal Effects of War* 3rd ed., 1948, pp. 340–343.

legislation amounted to a breach of international law. There is, therefore, room for the suggestion that what was decided in *Luther* v. *Sagor* was no more than that where a State, through legislation, confiscates without compensation the property of *its own nationals*,[2] the courts of other States may not, by reference to their own conceptions of morality or public policy, question such legislation and deny recognition to legal title which, in pursuance thereof, has been acquired within the territory of the confiscating State. Neither was there any question of international law involved in the American decisions relied upon in *Luther* v. *Sagor*.[3]

It is thus possible that the clarification of the issue raised by the judgment in the *Rose Mary* may take place not by way of confirmation of or departure from the decision, thus interpreted, in *Luther* v. *Sagor*, but by reference to the wider issue expressed in the following question : Does international law impose upon a State the duty to ensure that its courts give effect to such foreign legislation as is contrary to international law? It has been asserted that such English judicial authority as exists on the subject inclines to a negative answer to that question.[4] Such negative answer is likely to receive an accession of strength if the argument—which is controversial—is admitted that no other attitude can properly be taken by the courts of a country in which customary rules of international law are recognised as part of the law of the land. The paramount doctrine of sovereignty of Parliament may compel courts in this country to give effect to British legislation which is contrary to international law, but, it may be said, no such compulsion imposes itself upon them in respect of legislative acts of foreign countries. At the same time it is difficult to leave out of account the view that as States are not bound to submit to international jurisdiction the question whether their legislation is in conformity with international law, a competence of that nature cannot properly be attributed to domestic tribunals of a foreign country and that the assumption of any such power may not be conducive to the maintenance of friendly international relations. On the other hand, it may be said that friendly relations are likely to suffer if the courts of a country are constrained to lend their assistance to perpetrating a legal wrong committed either against its nationals or the nationals of another State (other than the confiscating State itself). Neither is the argument based on sovereignty conclusive. There may be

[2] See the qualifying statement by Russell L.J. in *Princess Olga Paley* v. *Weisz* [1929] 1 K.B. at p. 736. A number of American cases take that qualification into account. But see McNair, *op. cit.*, p. 362.

[3] *Underhill* v. *Hernandez* (1897) 168 U.S. 250; *Oetjen* v. *Central Leather Co.* (1917) 246 U.S. 397; *Ricaud* v. *American Metal Co.* (1917) 246 U.S. 304.

[4] See case cited by Sir Arnold McNair, *loc. cit.*, and Fachiri in *British Year Book of International Law*, 12 (1931) pp. 101–104.

force in the suggestion that there is a denial of the sovereignty of the State if foreign courts take it upon themselves to examine its legislation and to refuse to give effect to it as being contrary to international law. There may be no less force in the view that the respect for sovereignty of a State is put under a strain if its courts are compelled to give effect to foreign legislation which inflicts grievous injury upon its nationals in violation of international law.

It may be noted that the decision in the *Rose Mary* was not followed, in the same year, either by the Court of Venice, in *Anglo-Iranian Oil Co.* v. *Supor Oil Co.* (*Foro Italiano*, 78 (1953) I, p. 719), or by the Tokyo Court in *Nissho Maru*. However, in both cases the courts—while doubting their right to review foreign legislation—examined the Iranian Nationalisation Law from the point of view of its consistency with international law. Unlike the Court of Aden, they found that compensation offered by the Iranian Law was sufficient to enable them to hold that the expropriation was not of a confiscatory character. There may be significance in the circumstance that, notwithstanding incantations to the contrary, the two courts did in fact examine the foreign legislation in question. French courts have shown no hesitation, over a long period of years, to review foreign legislation and to deny to it effect, extraterritorial and other, if deemed contrary to the French conception of public policy (which includes respect for international law). The same applies to courts of some other countries. In this country there has been no disposition to decline to review foreign legislation and, in proper cases, to deny to it extraterritorial effect on the ground of its confiscatory or penal nature. It also seems reasonable to assume that the courts have power to examine foreign legislation from the point of view of its formal validity.

It is selfish to voice the apprehension that on account of any settlement of the controversy with Iran an opportunity may be lost to obtain an elucidation of the main issue thus raised by the decision in the *Rose Mary*.

H. Lauterpacht.

PRIVATE INTERNATIONAL LAW—BONA VACANTIA AND ULTIMUS HERES

In *re Maldonado* (*deceased*), *State of Spain* v. *Treasury Solicitor*,[1] Barnard J. granted letters of administration to the Spanish State in respect of the movable assets in England of Eloisa Hernandez

[1] [1953] 3 W.L.R. 204; [1953] 2 All E.R. 300.

Maldonado who had died in 1924, domiciled in Spain, intestate and without next-of-kin entitled to succeed according to Spanish law. Barnard J. found as a fact that, according to article 956 of the Spanish Civil Code, the Spanish State succeeded to the assets as *ultimus heres* and did not take them as *bona vacantia*. He held that such a claim raised a question of succession and was, therefore, governed by the law of the last domicile of the deceased. *Re Barnett's Trusts*,[2] and *In the Estate of Musurus*,[3] could be distinguished on the ground that there the claim of the Crown to the English estate as *bona vacantia* had prevailed over those of the Austrian and Turkish States respectively, seeing that by the laws of these countries the assets devolved upon the State as *bona vacantia* and not by way of succession. The Court of Appeal affirmed the decision of Barnard J.[4] Thus a new rule of Private International Law was given formal expression. It may be stated as follows: The estate in England of a person who dies domiciled abroad, intestate and without next-of-kin entitled to succeed according to the law of the last domicile of the deceased, devolves upon the public authorities of the country of the last domicile, if by the law of that country these authorities succeed as *ultimus heres*. If by the law of the country of the last domicile the public authorities claim the estate as *bona vacantia*, the claim must fail, seeing that title to *bona vacantia* is governed by the *lex situs*, which is English law.

In terms of abstract rules of law the new principle acknowledges the existence of two well-established rules of the conflict of laws, to the effect that succession to movables is governed by the law of the last domicile of the deceased, and that title to *bona vacantia* is determined by the *lex situs*. But regarded in the light of the problem of characterisation, of analytical jurisprudence and, in the final resort, of practical convenience and justice, the new principle is not without danger.

Up to the end of the eighteenth century the right of the sovereign to *bona vacantia* was treated, in England and the Continent alike, as a right of eminent domain rooted in Germanic law.[5] But in the nineteenth century, German pandectists[6] put forward

[2] [1902] 1 Ch. 847.
[3] [1936] 2 All E.R. 1666.
[4] [1954] 2 W.L.R. 64.
[5] *Dyke* v. *Walford* (1846) 5 Moo.P.C. 434 at pp. 487 *et seq.*; Blackstone, *Commentaries* II (15th ed. 1809), p. 494; Holdsworth, *History of English Law* VII (1925), pp. 539, 495. *Re Hole Estate* (1948) 56 Manitoba R. 295, 301 *et seq.*, Schröder, *Lehrbuch der Deutschen Rechtsgeschichte* (4th ed., 1902), pp. 195, 207, 334–5, 530.
[6] Vangerow, *Lehrbuch der Pandekten* II (7th ed., 1867), para. 564, p. 571; Dernburg, *Pandekten* III (7th ed. 1903) para. 138, p. 269; but see Blume, *Rheinisches Museum für Jurisprudenz* IV (1833), p 212, n. 6; Windscheid-Kipp, *Lehrbuch des Pandektenrechts* (8th ed., 1901), para. 570, p. 330.

the view that this right, as introduced into Roman law by Augustus,[7] was in the nature of a right of succession according to private law. Disregarding the public law character of the right in Germanic law, they rejected the only other alternative open for their consideration, namely that the State claimed the ownerless property as an occupant in private law.

This new theory spread quickly during the middle of the nineteenth century. It was taken into account, but not expressly adopted, by the Italian Civil Codes of 1865 and 1942[8]; it was embodied in the Spanish Civil Code of 1889,[9] the German Civil Code of 1900,[10] and the Swiss Civil Code of 1907.[11] Even in those countries whose codes had been enacted before the new theory had been put forward, the courts, except in Austria, began to take a favourable attitude towards the new doctrine.[12] Naturally, writers on Private International Law could not ignore the new trend, and from Savigny onwards[13] the new theory found expression in some quarters[14] in terms identical with those formulated in *Re Maldonado*. It was introduced into England by Wolff[15] and taken up by Dicey,[16] but has not, so far, reached the United States.[17]

Criticism of the new doctrine has been widespread and strong. In France it has been said that the theory of the State as the ultimate heir is wrong because private property is not maintained, while its maintenance is the aim of the law of succession.[18] In

[7] Gaius II, 150. Ulp.fragm. 28, 7.

[8] Article 586. The previous codes of the Italian states did not treat the State as an heir. See Risso, *Rivista di diritto privato* 8 (1938) 45, 57. See also article 760 of the Austrian Civil Code of 1811.

[9] Article 956.

[10] Article 1936.

[11] Article 466.

[12] Planiol et Ripert, *Traité pratique de Droit Civil Français*, IV (1928) No. 155, p. 189, with references. But see *Code Civil*, articles 768, 539, 713. For the Italian practice see Risso, *loc. cit.* at p. 68–70.

[13] *System des heutigen römischen Rechts*, 8 (1849) para. 377 (9), p. 315.

[14] For France see Planiol et Ripert, *loc. cit.*, No. 158, p. 195; with references to literature and cases, Weiss, *Traité de droit international privé*, IV (1910) pp. 564–67; Aubry et Rau, *Cours de Droit Civil Français* IX (1917) para. 606, p. 488. For Italy see Cavaglieri, *Foro Italiano*, 1922, I, 83; Cansacchi, *La devoluzione dei beni vacanti allo stato*, 1939. For Germany see Bar, *Theorie und Praxis des internationalen Privatrechts* II (2nd ed. 1889) para. 387, p. 351; Lewald, *Deutsches Internationales Privatrecht* (1931) No. 368, p. 303. *Hague Recueil* 9 (1925), IV, pp. 84–88.

[15] *Private International Law* (1945) para. 556, p. 591; para. 145, p. 157; (2nd ed.), para. 556, p. 579; para. 146, p. 157. *Cf. Re Barnett's Trusts* [1902] 1 Ch. 847, at p. 852 (argument).

[16] *Conflict of Laws* (6th ed., 1949) p. 818.

[17] Beale, *Conflict of Laws* II (1935), p. 1039, para. 309, 1, Goodrich, *Conflict of Laws* (3rd ed., 1949), p. 504, who draw only one distinction between claims of private individuals as successors and by the State as entitled to *bona vacantia*. See also *In the Estate of Bell* (1908) 52 S.J. 600.

[18] Planiol et Ripert, *loc. cit.*, No. 154, p. 188.

Germany it is recognised that, irrespectively of the legal form, the final purpose of the State is to increase its revenue.[19] In Switzerland it is stated that the new theory is preferable since it is more favourable to personal feelings. However, since the equation of the public authority to an heir would seriously weaken the rights of the public authority, the legislature found it necessary to confer special privileges upon the public authority which thus distinguish it from an ordinary heir.[20] In Italy, opinion is still divided as to whether the State is *ultimus heres* or not.[21]

As result, a recent writer[22] on private international law was able to state: "Malgré la tendance moderne à regarder l'Etat comme un héritier quand il est appelé à une succession faute de successibles au degré légal, le caractère politique de ses droits conduit à y voir l'exercice d'une prérogative de la puissance publique et à en limiter l'effet aux biens situés sur son territoire."

The modern distinction between the State as ultimate heir and as the collecter of *bona vacantia* is indeed misleading, for no distinction exists except in the name.[23] In the first place, as regards administration, even those countries where the State takes the estate as *bona vacantia* provide for a process of administration of some kind. This may be the ordinary process of administration,[24] or it may be a special type of proceedings.[25] On the other hand, also in countries where the State acts as heir, special administration proceedings are to be found.[26] In the second place, even in those countries which treat the State as an heir the liability of the latter is not unlimited, but is restricted, either in fact[27] or in law[28] to the assets of the estate. The ultimate beneficiary is always the State, or a public authority or a charitable institution, which takes

19 Enneccerus, *Lehrbuch des Bürgerlichen Rechts*, vol. 5 (ed. Coing), para. 8, p. 38.

20 Escher in *Zürcher Kommentar zum Z. G. B.* III, i (2nd ed., 1937), p. 78.

21 De Ruggiero-Maroi, *Istituzioni di diritto privato* (7th ed., 1948), para. 91, p. 418. Cass.Turin, March 11, 1922, *Giurisprudenza Italiana*, 1922, I, i. 407.

22 Batiffol, *Traité élémentaire de droit international privé* (1949) No. 659, p. 662; see also Niboyet, *Traité de droit international privé français*, IV (1944), No. 1207, p. 418.

23 Planiol et Ripert, *loc. cit.*, No. 156, p. 191. This can be seen clearly from the attitude of the various legal systems towards life insurances taken out by the deceased for the benefit of his heir. The State takes the benefit always. See Planiol et Ripert, No. 155, p. 190. C. A. Paris, February 14, 1890, D. 91, 2.273; S. 91, 2.109. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, II, 2 (6th ed., 1924), para. 491, p. 372, II, 1 (3); Elfin in (1946) 36 Geo.L.J. 117–21, was not available.

24 Halsbury's *Laws of England* (Hailsham ed.) Vol. 10, No. 880, p. 665; France: Planiol et Ripert, *loc. cit.*, No. 156.

25 Austria: Ehrenzweig, *loc cit.*, p. 371, II.

26 German Civil Code, paras. 1964 *et seq.*

27 *Re Maldonado* [1953] 2 All E.R. 300, at pp. 304, 305.

28 Swiss Civil Code, articles 592, 550, 555; German Civil Code, para. 2011.

the assets clear of debts as a universal successor for public purposes.[29]

To ignore this functional identity and to rely exclusively on the formal classification of the claim of the foreign State according to the law of the last domicile of the deceased, amounts to a faulty process of characterisation according to the *lex causae*. The Court of Appeal has been much criticised for having characterised a claim under foreign law according to English technical notions in *Ogden* v. *Ogden*[30] merely because of the wording in which the rule of foreign law was formulated and irrespectively of the function of the rule within the foreign legal system. To do the reverse and to characterise according to the technical notions of the *lex causae* merely because the wording of the rule recalls a certain legal institution of the *lex causae*, without in reality partaking of the nature of that institution, is not less open to criticism. Characterisation according to the function of the rule of foreign law within the setting of the foreign legal system does not amount to a partial non-acceptance of foreign law, as Morris L.J. thought (at p. 76), whose opinion appears to have been shared by Jenkins L.J. (at p. 74), but to its full realisation in appropriating to it the proper conflict rule of English law. The process adopted in *Re Maldonado* encourages foreign countries to cloak their claims to *bona vacantia* in the guise of claims by the *ultimus heres*,[31] which can be done without much legislative change, since the two types of claims do not differ in substance.

K. Lipstein.

CRIMINAL LAW—CONSPIRACY—PUBLIC MISCHIEF

The strain thrown upon a jury by the trial of complicated charges of fraud and conspiracy is well illustrated by the pottery case, *R.* v. *Newland* [1953] 3 W.L.R. 827. The trial lasted forty-one days, and is said to have been the longest in the history of the Central Criminal Court. Simple arithmetic shows that the jury alone lost nearly two working man-years over it. Apart from this loss of time, the conditions of jury-trial are hardly adequate for such

[29] Robertson, *Civil Proceedings by and against the Crown* (1908), pp. 492 *et seq.*; Enever, *Bona Vacantia* (1927). But see *Re Hole Estate* (1948), 56 Man.L.R. 295, at p. 315.

[30] [1908] p. 46.

[31] Compare the Ultimate Heir Act, 1921, Rev. Statutes of Alberta (1922), Chap. 144, amended 1929, chap. 11, and the observations of Lord Buckmaster in *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* [1928] A.C. 475. at p. 487. See also Mugdan, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, V (1899), p. 201; *Motive*, V, p. 379.

involved and protracted proceedings. Jurors are expected to absorb all the evidence without taking a note, and to distinguish nicely between the evidence given against each defendant, with only the help afforded by the judge's summing up. To make the system work at all, it is essential for the trial judge in a case of any complexity to direct the jury separately for each defendant, and to take the verdict for each before passing to consider the next. This was done in the present instance, and the Court of Criminal Appeal refused to sustain an objection that the jury had been allowed to disperse between its various verdicts.

The main interest of the case relates to the vexed question of public mischief. The defendants were concerned in a conspiracy which resulted in £70,000 of decorated domestic pottery intended for export being diverted to the home market. The export of pottery was governed by Domestic Pottery Orders, but these dealt only with manufacturers or persons holding export certificates, and the defendants were neither of these, but got hold of the pottery by falsely representing to manufacturers that it was required for the export market. Because of the difficulty of bringing the defendants within the terms of the Orders, a count for conspiracy to violate the Orders was not proceeded with. For some reason, also, a count for conspiracy to defraud manufacturers into parting with decorated pottery by false representations was not proceeded with, the jury being discharged from giving a verdict on this count (see *The Times*, April 2, 1953). The remaining count was for conspiracy to effect a public mischief, the particulars of offence being that the defendants conspired by fraudulent means to obtain and by dishonest devices to distribute to the home market decorated pottery covered by the Domestic Pottery Orders. On this count the defendants were convicted. The trial judge, Glyn-Jones J., emphasised the element of fraud in the case, saying: "The bad feature of it is the very grave commercial dishonesty that accompanied the scheme from first to last. It is not so much that the regulations were evaded and the country deprived of foreign currency which gives gravity to this offence, it is the lying, the fraud, the printing of false documents."

An appeal was taken only on points of law, the main question being whether the offence of conspiracy to effect a public mischief was known to the law. Although the appeal was dismissed, the court showed itself not insensitive to the criticisms that have been passed upon the offence of public mischief. The court said that if the offence of public mischief were extended, "it might enable judges to declare new offences which should be the business of the legislature. The objections to such a course were forcibly pointed

out by Sir Fitzjames Stephen." In accordance with this general philosophy, the court went out of its way to disapprove *R.* v. *Manley* [1933] 1 K.B. 529, where the notion of public mischief as a crime was applied to a case lacking the element of conspiracy. To say that all offences of a public nature are indictable would, said the court in *Newland*, "leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour. However beneficial that might have been in days when Parliament met seldom or, at least, at long intervals, it surely is now the province of the legislature and not of the judiciary to create new criminal offences." After twice stating that the court was bound by *Manley*, the judgment proceeds: "It may be that *Manley's* case will some day be considered by the House of Lords and in any case we venture to think that it would be a useful reform if such conduct as was there disclosed were made a summary offence by the legislature. We need not further enlarge on it, as the charge we are now considering was one of conspiracy, except to say that in our considered opinion the safe course is no longer to follow it." The last sentence is puzzling, for if the Court of Criminal Appeal is bound by *Manley's* case, trial judges are also bound by it, so that a direction not to follow it is self-contradictory. Perhaps the word "follow" is a mistake for "extend." On this assumption, what is meant is that *Manley* is to be followed on its actual facts, but is not to be extended to other situations supposed to amount to public mischief, in the absence of conspiracy. It may, however, be pointed out that the court erred in saying that it was bound by *Manley*, for, at any rate when sitting in full court, the Court of Criminal Appeal is not bound by its previous decisions which are now held to have resulted in a wrong conviction (*Taylor* [1950] 2 K.B. 368). However, even if *Manley* is wrong as an example of public mischief, it may be that a conviction on the same facts could be sustained as a wrongful interference with the course of justice.

Although the court discountenanced the general offence of public mischief and the power of the judges to add to existing crime, it was held that a charge of conspiring to produce a public mischief was valid. The reason given was that conspiracy to produce a public mischief was a well-established kind of crime, so that in upholding a conviction for it "we are in no way creating a new offence." This is hardly convincing, for if there is a crime of conspiring to effect a public mischief, it is open to the judges to penalise any immoral agreement by a number of persons, and so in effect to make new crimes. It is nothing but verbal jugglery

to say that the fixity of the name " conspiracy " prevents anything done under that name from being judicial legislation. Why, after all, did the court denounce the principle of *Manley*? If it is to be accounted judicial legislation to administer a crime of public mischief for individuals, owing to the lack of definition of " public mischief," it must be equally judicial legislation to administer this crime for a plurality of defendants.

There is some interest in looking at the authorities vouched by the court for the offence of conspiracy to procure a public mischief. One was *Starling* (*Sterling*) (1665) 1 Sid. 174, 1 Lev. 126, which dates from the time when the judges, following the doctrine developed by the Star Chamber, claimed the power to punish even individuals for acts thought to be *contra bonos mores*. Another was a passage in Hawkins's *Pleas of the Crown*; the court paid no attention to the fact that, as Wright and Sayre have pointed out, the authorities cited by Hawkins do not support him. Apart from a string of civil cases, the only authorities quoted of any modernity were *Brailsford* [1905] 2 K.B. 730; *Porter* [1910] 1 K.B. 369, and *Bassey* (1931) 47 T.L.R. 22. These cases do, indeed, purport to decide that conspiracy to effect a public mischief is a crime, but the first in fact involved a conspiracy to defraud and to commit the crime of obtaining by false pretences; the second involved a criminal obstruction of justice and a criminal contempt of court; while the third involved a conspiracy to defraud and to commit the crime of forgery.

In the same way, the instant case involved a conspiracy to defraud; and there are passages in the judgment which stress this aspect of it. On the other hand, some passages stress the element of public mischief in circumventing the regulations and impairing the export drive. The court had been pressed in argument with the point that if it is criminal to agree to evade a statute in a way that is not criminal apart from the element of conspiracy, then an ordinary plan by a taxpayer and his legal advisers for avoiding or minimising taxation must be criminal: whereas there is authority for saying that it may be lawful. The answer given by the court was that in lawful tax avoidance the taxpayer does " nothing dishonest, nothing false, nothing deceptive." This answer implies that in the instant case the defendants were convicted not merely for evading the regulations but for dishonesty, falsehood and deception. But if this is so, the references to public mischief were out of place, and the charge should surely have been of conspiracy to defraud.

The encouraging features of the pottery case is that, at least in words, the judges have given up their historic claim to create

new crimes—a claim which more than anything else operated to defeat the attempts at codification of the nineteenth century. We now know that even if *Manley* is followed on its actual facts, it will not be extended. But the question presented to the court in *Newland* was not public mischief by an individual but the ambit of conspiracy, and in this field the judgment does nothing to clarify the law.

GLANVILLE L. WILLIAMS.

MILITARY LAW—CONDONATION—COURT-MARTIAL—POWER TO DISSOLVE—COMMON LAW OF THE ARMY

"IT has long been recognised that a military offence can be condoned" (*Manual of Military Law*, 1951 ed., Part I, p. 456, note 3 (*a*)). This statement, though undoubtedly correct, is apt to surprise those who are acquainted only with civil (as distinct from military) law. It is, moreover, difficult to reconcile with the principle of constitutional law, recognised by both military and civil courts, that the commands of a superior are no defence to proceedings arising out of the commission of an unlawful act; for, if an unlawful act cannot be lawfully commanded, why can it be condoned? The *Manual* goes on, "For the purpose of barring a trial, condonation means such conduct on the part of a competent authority—*i.e.*, an authority having power to determine that the charge should not be proceeded with—as is inconsistent with subsequently trying the offender, and as would make it inequitable to do so; it must be a deliberate and intentional act, done in the authority's magisterial capacity and with full knowledge of all material facts."

In *R.* v. *Durkin* [1953] 2 Q.B. 364, the accused had been arrested on a charge of stealing. Subsequently, pending the taking of a Summary of Evidence, he was ordered out of close arrest into open arrest and further ordered to resume his normal duties. The Court-Martial Appeal Court had no difficulty in deciding that this did not amount to condonation; but, having regard to the frequency with which condonation is pleaded before courts-martial and to the confusion of thought which is often manifested on such occasions, one passage in the judgment of the court, delivered by Lord Goddard C.J., deserves attention, namely, "It is difficult to understand how one can condone an offence until one knows that an offence has been committed" (p. 373). This passage, which at first might be taken to be a blinding glimpse of the obvious, supports

a view which has hitherto by no means received universal acceptance, namely, that cases of condonation are rare and can hardly ever arise unless the accused has either committed the offence in the presence of his commanding officer or has made a full confession. The commanding officer, who in effect says, "I do not know whether you are guilty or not and you must be tried, but meantime carry on," has *not* condoned the offence. The commanding officer who says, "I know exactly what you have done and I do not mind, so carry on," *has* condoned the offence. So also, perhaps, has the commanding officer who says, "I do not know the truth of this matter and I do not care; it strikes me as of little consequence; so carry on."

The case under discussion raised further points which Lord Goddard C.J. described as "highly technical and complicated," but only one calls for comment here.

Before the first court-martial before whom the accused was brought he pleaded condonation, and that court wrongly upheld the plea. Such a finding, however, by section 54 (6) of the Army Act, requires confirmation and in this case the confirming officer refused to confirm. Under Rule of Procedure 36 (D) the confirming officer could have reassembled the court to proceed with the trial of the substantive issue. Instead of doing so, however, for reasons which it is not necessary now to examine, he dissolved that court and convened a fresh one to try the accused. On appeal the point was taken on behalf of the accused that the confirming officer had no power to take this course; that the accused was still before the first court; and that consequently the second court, which in fact convicted him, acted without jurisdiction.

Section 53 of the Army Act expressly confers power to dissolve a court in certain specified circumstances, for example, if the president dies, but, beyond that, no express powers, such as would cover the present case, are conferred, though Rule of Procedure 66 does refer to dissolution "as specified in section 53 of the Army Act, or otherwise," and these last two words appear to envisage a power to dissolve other than that expressly conferred by the Act. This point was taken on behalf of the Crown and it was argued that by the common law of the Army a power to dissolve existed and was in fact not infrequently exercised. This argument appears to have found favour with the Court-Martial Appeal Court which likened the power to dissolve a court-martial to the power, nowhere expressly conferred, of a judge to discharge a jury and begin again with a new jury. In holding that there was in effect an inherent power to dissolve, the Appeal Court doubted whether it could be exercised "if the court-martial had once come to a

decision." What precisely is meant by these words, which were uttered *obiter*, is far from clear. Since section 54 (6) of the Army Act declares that (except in the case of an acquittal), no finding or sentence is valid until confirmed, it is difficult to see why a court-martial should not be dissolved and the accused tried again before another court-martial where the first trial has been conducted irregularly and has resulted in an unconfirmed conviction. This has certainly happened on a good many occasions in practice.

But, be that as it may, it is of great interest and importance that countenance should have been given to the suggestion that there is a "common law of the Army." The subject is too wide to be pursued far in a short note; but a study of the powers exercised by the medieval Constable and Marshal would lead one to suppose that there was in fact a military common law long before the Mutiny and Army Acts were enacted and that, if the legislature had not intervened, this common law would have developed naturally and of necessity to cover many points now covered by the Army Act. Since even the most farseeing of codes is almost certain to omit something, it is comforting to think that there may be a fund of common law to tap when all else fails.

E. Garth Moore.

CONTRACT—MISTAKE—RECTIFICATION—RIGHT TO RESCIND

If both parties to a written contract for the sale of goods described as "horsebeans" enter into that contract on the mistaken understanding that horsebeans are the equivalent of the French "feveroles," can the court rectify the contract to turn it into a sale of "horsebeans, *i.e.*, feveroles"? This was the question directly before the Court of Appeal in *Frederick E. Rose Ltd.* v. *William H. Pim, Ltd.* [1953] 2 Q.B. 450. Both parties were middlemen. The plaintiffs had received from Egypt an order for "feveroles," and, not comprehending that word, had asked the defendants what it meant. The latter innocently told them that feveroles meant horsebeans. Thereupon, after various negotiations, agreement was reached between the parties on the sale of quantities of horsebeans. Three sets of written contracts were then drawn up, suppliers selling to defendants, defendants selling to plaintiffs, and plaintiffs to their Egyptian customers. When the goods arrived, the Egyptians found that, although they were horsebeans, they were not feveroles—a peculiar species of horsebean. The plaintiffs sought rectification of the written contract and succeeded before Pilcher J. [1953] 1 Lloyd's Rep. 84. He held that the parties

" made an oral agreement in which they intended to deal in horse-beans of the feverole type." The written contract must accordingly be rectified by the addition of the word " feverole " after " horse-beans." The defendants appealed.

In reaching a different conclusion, the Court of Appeal may be said to have emphasised the objective view of contractual intention. The court was unanimously of the opinion that the oral contract spoke of horsebeans and of horsebeans only. Perhaps, in their minds, the parties " intended something different," but they had not " agreed something different " (*per* Denning L.J. at p. 462). The written agreement was in exactly the same terms. Rectification must, therefore, be refused.

Although the reasoning of the Court of Appeal is attractive, it would be odd if a plaintiff were to be without a remedy in this situation. In consequence, the case will probably be of greatest interest in respect of two questions, neither of which arose for decision. Both prompted Denning L.J. to suggest the proper remedies. First, what was the effect of the oral representation made in good faith by the defendants? No one claimed that it was a condition precedent to the operation of the written contract. It was undoubtedly a misrepresentation inducing that contract. Was it more? Originally, the plaintiffs had included a claim for damages based upon the breach of this promise, terming it a " collateral warranty." That claim was abandoned at the trial, not, it seems, as Pilcher J. thought, because the sellers had pleaded section 4 of the Sale of Goods Act, 1893—this could be no defence when the goods had been delivered and payment made—but apparently because counsel considered that the oral promise contradicted the written contract and was excluded by the parol evidence rule (*ibid.*, 455). Denning L.J. denied that there was any contradiction. To his mind " the only difficulty in such a claim might be whether there was a contractual warranty or merely an innocent misrepresentation." With respect, it is submitted that, apart from the problem of *animus contrahendi*, there was another difficulty. For the purposes of rectification the court was required to decide whether it agreed with the view which Pilcher J. took of the area of oral agreement. It did not agree with him. The terms of the oral agreement were said to be identical with those of the written. Feveroles had no place in either. Where, then, did the " collateral warranty " stand? Of which contract did that warranty form part? Could damages have been awarded once rectification had been refused?

Oral representations of this sort are usually troublesome either because of the need for a memorandum in writing, or because of the

parol evidence rule. In both cases the courts have frequently made use of an analysis different from that of "collateral warranty." If the promise is the basis on which the main contract is made, and the promisee would clearly not have proceeded with that contract without it, it is sometimes recognised as a collateral contract, the consideration being provided when the promisee enters into the subsequent (and usually written) agreement. (See *e.g.*, *Jameson* v. *Kinmell Bay Land Co.* (1931) 47 T.L.R. 593, where the oral "contract" was not caught by section 40 of the Law of Property Act, 1925.) The major objection to such a solution in *Rose* v. *Pim* might be that the promise related to the "present condition of the subject-matter of the principal contract" and could not, therefore, stand as a separate contract (see *e.g.*, *Gale* v. *Harvey* (1893) 95 L.T.J. 82). This objection has not always been conclusive. For example, in *Webster* v. *Higgin* [1949] 2 All E.R. 127, the Court of Appeal enforced an oral promise of this nature as a collateral agreement. In *Rose* v. *Pim* it is not clear whether by "contractual warranty" Denning L.J. meant "such a separate contract as a warranty must necessarily import" in this situation (*per* Evershed M.R., *Mahon* v. *Ainscough* [1952] 1 All E.R. 337, 340). A warranty is always contractual in that it is part of a contract, and usually collateral in the sense that it is not a condition; but a "warranty" which is the sole obligation of one side in a separate contract is collateral and contractual in quite a different sense. Plaintiffs in the position of Frederick Rose, Ltd., who are now invited by Denning L.J. to claim damages, may find this distinction important, more particularly if section 4 of the Sale of Goods Act can be satisfied only by means of the written contract which lacks the term they wish to enforce.

The second problem which might have arisen in *Rose* v. *Pim* is the question of mistake. Denning L.J. discusses this in a typically stimulating passage (at pp. 459–461). The goods were "essentially different from what they were believed to be." Having in mind the dicta of Lord Atkin in *Bell* v. *Lever* [1953] A.C. 161, 218, where he uses a similar phrase, one might conclude that the contract was therefore void. Denning L.J. thought otherwise. After a short review of some of the cases, he summarises his oft-cited dictum in *Solle* v. *Butcher* [1950] 1 K.B. 671, 691, saying, "Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground." This is the position "since the fusion of law and equity." One objection to this formula might be that it does not take account of cases such as *Cundy* v. *Lindsay* (1878)

3 App.Cas. 459. Another could arise from its failure to mention contracts entered into under a mistaken belief that the subject-matter exists. As Denning L.J. pointed out in *Solle* v. *Butcher* (*supra*, at p. 691), this failure of a condition precedent, as he preferred to call it, renders the contract void *ab initio*. More important, however, is the reiteration by Denning L.J. in *Rose* v. *Pim*, that error as to essential quality cannot make the contract a nullity. If that is right, much depends upon the equitable remedy of rescission for mistake, which was revived and extended in *Solle* v. *Butcher*. One waits expectantly, therefore, to hear whether this contract was voidable and could have been set aside. "I think it could," says Denning L.J. "if the parties had acted in time."

Everything depends, then, upon celerity. How quickly must the plaintiff act? That question the learned Lord Justice answers by remarking, "This mistake was induced by the innocent misrepresentation of the defendants," and he concludes, "The fact that the contract was executed would not be a bar to rescission" (*i.e.*, *Angel* v. *Jay* [1911] 1 K.B. 666, is wrong)—"But once the buyers and sub-buyers accepted the goods, and treated themselves as owners of them, they could no longer claim rescission: see *Leaf* v. *International Galleries* [1950] 2 K.B. 86." It is tempting to ask whether the buyers had not accepted the goods within section 35 of the Sale of Goods Act, before the goods had reached the sub-buyers. But of much greater interest is the fact that in this paragraph the right to rescind for mistake is not distinguished from the right to rescind for innocent misrepresentation. Rather the two are treated as co-extensive. After *Solle* v. *Butcher*, commentators were apt to inquire "what is there to prevent a sufferer from an innocent misrepresentation"—(who has lost the right to rescind)—"from resting his claim to relief upon the ground of mistake?" (Cheshire & Fifoot, *Contract*, 3rd ed., p. 251). Denning L.J. in *Rose* v. *Pim* suggests that failure on the one entails failure on the other ground. Indeed, where specific goods are concerned (assuming that a claim based on innocent misrepresentation is initially possible), rescission will rarely be available. For it appears that "a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred" (*per* Denning L.J. at p. 91 in *Leaf* v. *International Galleries*, *supra*). Will not the very formation of a contract for the sale of specific goods, by passing the property in them under section 18, rule 1 of the Sale of Goods Act, prevent not only rejection (section 11 (1) (*c*)), but also, now, rescission on any ground at all? Was not that really the position in *Leaf* v. *International Galleries*? The only escape seems to lie in a

narrow construction of "unconditional" in section 18, rule 1, so as to prevent the property from passing whenever the contract contains a "condition" in the sense of essential term—a not infrequent occurrence. Further, where the right to reject, and to rescind, is lost by acceptance, the mistake will often not be discovered until after acceptance of the goods, or, at any rate, part thereof. And where there has been an act inconsistent with the ownership of the seller before delivery, execution of the contract will destroy all the buyer's rights.

If these are, in truth, the conclusions to be drawn from recent dicta culminating in those in *Rose* v. *Pim*, the fusion of law and equity seems, in this connection, to mean the application of section 11 (1) (*c*) of the Sale of Goods Act, 1893, which deals only with the right of rejection by the buyer, to the equitable remedy of rescission, both for innocent misrepresentation and for mistake, presumably whether claimed by buyer or seller. Many will find it odd that such a solution should be adumbrated by Denning L.J. after his vigorous attempts to extend the scope of these equitable remedies, and to sweep away the marcescent, but not altogether dissimilar, doctrine of *Angel* v. *Jay*.

K. W. Wedderburn.

TORT—CONTRIBUTORY NEGLIGENCE—CAUSATION

In *Stapley* v. *Gypsum Mines, Ltd.* [1953] A.C. 663 H.L.(E.), everything turns upon the precise facts. On August 21, 1950, the roof of No. 9 stope in the defendant's gypsum mine was "drummy"—it gave out, when tapped, a hollow sound indicating that it was in a dangerous condition. Stapley and Dale were due to work in that part of the mine, Stapley as a breaker (who normally works in a stope), and Dale as a borer (who normally works in the twitten). The twitten is the road between the stopes (the actual working faces) and the main haulage way. The borer and the breaker are of equal status, neither being authorised to give orders to the other; they together are concerned, the one by breaking up the gypsum, the other by clearing the road, to convey manually or mechanically the gypsum mined to the haulage way.

Before they began work on August 21, Dale and Stapley were ordered by the foreman to bring down the roof of the stope. This was a proper and lawful order, and Dale and Stapley were proper persons to be entrusted with the task and to perform it without supervision. They were both well aware that such an order meant that they were not to work in the stope until they had got the roof

down. The roof could be brought down in three ways—namely with picks, with pinch bars or by boring and getting it blasted by a shot-firer. These methods were well known to both men. They tried for about half an hour to get the roof down with picks. They failed to do so. They then decided, in disregard of their instructions, to give up the job and to get along with their ordinary work. It is expressly stated by Lord Reid (p. 680) that " Stapley had nothing to gain from his disobedience." Accordingly Dale went to work in the twitten a little way away, Stapley in Stope No. 9. When Dale returned to the stope in about half an hour's time he found Stapley buried beneath a quantity of gypsum which had fallen from the roof and killed him.

Although there are statutory regulations which are relevant (and especially Regulations 7, 14 and 15 of the Metalliferous Mines General Regulations, 1938 and 1945), it is fortunately possible to deal with the case, as did the House of Lords, without distinguishing between statutory and common law liability. Dale as well as Stapley had clearly committed a breach of duty in disobeying the foreman's instructions. Since the abolition of the doctrine of common employment by the Law Reform (Personal Injuries) Act, 1948, Dale's default is imputable to his employers. If Stapley's death is held to be the result, even though partly only, of Dale's default, Dale and his employers, the Gypsum Mines Ltd. are responsible under the Law Reform (Contributory Negligence) Act, 1945, for Dale's share in causing the death. The point in issue is not whether Dale committed a breach of duty nor of what sort, but whether Dale's admitted default caused the death of Stapley and, if yes, the proportion of responsibility to be attributed to that default.

In an action for damages by Stapley's widow against the Gypsum Mines, Ltd., the trial judge (Sellers J.) held that Dale's default did contribute to Stapley's death. He divided the responsibility equally between the two men and accordingly allowed the widow to recover one half of the damage she had suffered by the death. The Court of Appeal ([1952] 2 Q.B. 575, Singleton, Birkett and Morris L.JJ.) reversed the decision of Sellers J. upon two grounds, one of which is described by Lord Porter (p. 285) as " elusive and difficult " and need not detain us here. The other is plainly stated by Birkett L.J. (p. 592) : namely that Stapley's death was solely caused by his own wrongful act in electing to resume work under the " drummy " roof when he knew that he ought not to do so—an act which was quite distinct from any default in failing to bring the roof down.

On appeal to the House their Lordships were divided three and

two. The majority (Lord Oaksey, Lord Reid and Lord Tucker) were of opinion that Dale's default contributed to the accident but held (Lord Oaksey *dubitante*) that Stapley's responsibility was by far the greater, assessing it at 80 per cent. Lord Oaksey would have preferred the equal division which commended itself to Sellers J. The minority (Lord Porter and Lord Asquith of Bishopstone) emphatically agreed with the second reason which had been expressed by Birkett L.J. in the Court of Appeal, and were of opinion that Stapley was alone responsible for his death.

The decision of the House of Lords gives rise to a number of what euphemistically may be called paradoxes.

(i) First: in so far as any *proposition of law* commends itself to the majority of their Lordships, it is the proposition adopted by the *minority* and expressed, with his customary felicity, by Lord Asquith—namely (p. 687):

> "It is still part of the law of this country that two causes may both be necessary preconditions of a particular result—damage to X—yet the one may, if the facts justify that conclusion, be treated as the real, substantial, direct or effective cause, and the other dismissed as at best a causa sine qua non and ignored for purposes of legal liability. This is a doctrine affirmed by your Lordships' House, and not, in my view, displaced by the Law Reform (Contributory Negligence) Act, 1945."

Lord Porter (p. 677) is similarly of opinion that an inquiry into the causes of an event is "of the same nature as existed before the change"—*i.e.*, the change which deprived contributory negligence of its power utterly to defeat the plaintiff's claim.

Similarly (and more importantly because he was a member of the majority), Lord Reid, when dealing with the situation as it stands after the 1945 Act, said (p. 681):

> "one may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be regarded as too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any tests can be applied generally."

Moreover Lord Oaksey and Lord Tucker had recently taken part in a Privy Council case, *Sigurdson* v. *British Columbia Electric*

Railway [1953] A.C. 291 (*post*, p. 42), in which the respondents were held solely responsible for an accident causing the destruction of the appellant's car although the appellant had driven his car on to the respondent's tram lines in contravention of the relevant regulations; and Lord Tucker makes it clear by citing the judgment he had delivered in *Sigurdson's* case that he is not receding from the view of the law which he had expressed in that case.

Thus, so far as the formulated doctrine of law is concerned, *Stapley's* case is not calculated to give any aid and comfort to the opinion expressed by Denning L.J. in *Davies* v. *Swan Motor Co., etc.* [1949] 2 K.B. 291, and elsewhere, that the 1945 Act has created a new heaven and earth in the matter of causation and has swept aside *Davies* v. *Mann* (1842) 10 M. & W. 546, and all other cases which impute sole liability to one party when the misdoings of both were relevant to the occurrence of the accident. Nevertheless, Denning L.J. may find not a little consolation in the reflection that, however the rule of *law* may have been expressed, the House in the *result* did what he maintains should be done generally and attributed causative effect to the default of Dale despite the subsequent, several, distinct, separate, and, as Lord Wright would say, " ultroneous " act of Stapley in electing contrary to orders to work in stope No. 9.

(ii) The second paradox is this. The House is at pains to emphasise that the question, whether for the purposes of legal liability one event is or is not causative of another, is a question primarily of fact and of " broad " or " plain " common sense. If the House *is* right on this point, then it has for all practical purposes ousted itself from jurisdiction in the matter. The House is very far, almost infinitely, removed from the issue of fact—it is quite certainly not a tribunal suitable to decide such issues. And whatever infallibility current legal theory would have us attribute to the House of Lords, it has not yet been claimed that they should be regarded as having a monopoly of plain common sense.

The role of the House in a matter of causation would seem, if their Lordships' proposition is accepted, to be limited to ascertaining whether the judge of first instance has misdirected himself as a matter of law when considering the issue of fact from a common sense point of view. If the relevant law has the order of indeterminateness which characterises Lord Reid's statement, *supra*, or is merely permissive in the form stated by Lord Asquith, it will be difficult even with the best of good will for a judge of first instance actually to misdirect himself. On this view the House has virtually no function and the decision proper to the House in *Stapley's* case was that taken by Lord Oaksey, namely to uphold the judgment of

the court of first instance; for there is really no evidence that Sellers J. did misdirect himself at the trial.

(iii) A further hare was started by Lord Reid which it is hoped will be promptly scotched. Having decided that "in the ordinary plain common sense of the business" Dale's default contributed to Stapley's death, he added (p. 682):

> "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot I think be assessed without considering the relative importance of his acts in causing the damage *apart from his blameworthiness*. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope *contributed more immediately* to the accident than anything that Dale did or failed to do." (*Italics added.*)

For this reason, apparently, Lord Reid decided to attribute 80 per cent. of the responsibility to Stapley. The courts have experienced sufficient difficulty in deciding, on the basis of plain common sense or otherwise, whether an event was or was not immediately or proximately or directly or effectively the cause of another. To ask them now to embark upon the inquiry whether a cause is more or is less immediate and the rest of it really is supererogatory and appears to be quite unnecessary. Let blameworthiness by itself continue to be the criterion of apportionment once it is decided that there should be apportionment—blameworthiness is by itself a criterion quite sufficiently indefinite and flexible to enable justice to be done.

When five judges have held that Dale's default did not contribute to the accident and four that it did, the plain common sense of the matter seems to be that the issue of fact is very nicely balanced. It is hard to believe that the right answer is that which commended itself to two only out of the nine judges, even though that answer was evidently a compromise. The most pressing question raised by *Stapley's* case is whether it is in the public interest that nicely balanced issues of fact should be the subject of the extremely expensive process of appeal to the House of Lords. That process does not appear to be ideally adapted to the solution of a problem which is in effect whether a chess board is for legal purposes to be regarded as black squares superimposed upon a white background or white upon black.

When a question of causation is evidently dubious, it may be of advantage to the student to ask himself what is the *minimum* change which would make the matter *clear to his mind*. If, after

they had agreed not to bring the roof down, Dale had said to Stapley "But don't work at No. 9, go to No. 8 instead," would that make it clear that Stapley's act in going into No. 9 was the sole cause of his death? Is it relevant whether Dale concurred or not in Stapley's working in No. 9? Is it the degree of freedom which Stapley may effectively have had in deciding whether or not to work at No. 9 which is the critical factor?

The truth of the matter, as it seems to me, is that we have two relevant concepts only, both of them *sui generis* and neither of them convertible into other terms. The one is "occasion" (without adjective) which is, I think, what Lord Asquith names a "precondition," the other is "cause" (equally without adjective) as contrasted with "occasion." It is a little thing which moves the mind to recognise in one event the concept of "cause," in another that of "occasion"; for *in rerum natura* neither event actually bears a distinctive legal label. In so far as an actor dominates a situation, the events constituting that situation tend to take on the aspect of "occasion" in relation to his act, and his act begins to stand out as "cause" of the subsequent event. Did Stapley *sufficiently* dominate the situation created by the decision not to bring down the roof to enable us to view that situation as the occasion merely of his subsequent act?

If the answer is uncertain, it does not cure the uncertainty to make appeals to common sense. It would be more helpful to the student, and possibly to the courts, to direct attention to the factor which is capable of moving the mind decisively to prefer one concept to the other as more appropriate to a particular situation. The instrument most effective to move the mind seems to be the lucky metaphor. Perhaps the main business of the lawyer in this matter of causation is simply the finding of that metaphor which is capable of moving the mind to see in the event (which is probably neutral in itself) the pattern which he desires to be seen there. A good deal of legal argument is of this sort. It is not the worse for that. But it would be helpful if the courts were to specify the nature of the task which they set themselves. We might then have less appeal made to common sense. Common sense is apt to go astray. Indeed, what passes for common sense in this matter is often a more or less violent and quite uncomprehending seizing upon a particular picture of the event and a monotonous reiteration that that is the right and the only picture possible. What should interest the lawyer is *how* one mind came to seize upon that picture (which produces one answer), and the other upon this (which produces the opposite answer). It will be found, I think, that Lord Sumner did more to clarify the notion of cause

in the legal sense when he coined the happy phrase of "the hand of the original wrongdoer being still heavy" upon the plaintiff, than when he attempted to divide the parts of a second in *Loach's* case; and it may be that Lord Birkenhead's much cited proposition in *The Volute* (which is sensible enough in itself) is today becoming an obstacle to what would really be the more rational approach to these cases. Broad common sense is better left to juries. A court of first instance may now be called upon to discharge the function of a jury: but it still seems wholly unreasonable to seek to empanel the House of Lords if only because the one thing a good jury really must do is to preserve an impressive silence as to its reasons, a course of conduct from which the House is constitutionally debarred.

C. J. Hamson.

TORT—CONTRIBUTORY NEGLIGENCE—CAUSATION

Marvin Sigurdson v. *British Columbia Electric Railway Co., Ltd.* [1953] A.C. 291 (J.C.), forms a pretty pendant to *Stapley* v. *Gypsum Mines, Ltd.* (*supra*).

The Broadway of the City of Vancouver may be regarded as divided into three portions—a southern (reserved for normal eastbound traffic), a central (occupied by tracks along which the respondents (defendants) ran their trams) and a northern (reserved for normal westbound traffic). The plaintiff (appellant) was driving his car along the southern portion in the proper easterly direction and was minded to call at a garage on the northern side, a manoeuvre which involved going across the defendants' tracks and across the westbound traffic. It was broad daylight on a fine dry summer's day. The plaintiff saw a tram of the defendants 600 feet behind him travelling in the same easterly direction as himself. There was no other eastbound traffic, but there were some cars travelling westwards on the other side of the tracks. The plaintiff thought that he would be able to cross between two of those oncoming westbound cars, but they closed up as they came along. Accordingly, having made all the proper signals, he stopped to wait. By this time, however, his car was lying across the defendants' tracks. When he stopped he looked down the tracks and saw that the defendants' tram was still 200 to 250 feet away. The view was wholly unobstructed. He looked again to see if he could go across the westbound traffic, decided that he could still not do so and then, again glancing down the tracks, discovered

that the tram was less than 100 feet away and closing upon him fast. Being now in imminent peril, he attempted to back off the tracks, but it was too late. The impact of the collision was such that the plaintiff's car had to be sold for scrap.

Under various statutes and regulations applicable in British Columbia, trams (street cars) are given right of way and the driver of a vehicle is *inter alia* prohibited from crossing a street otherwise than at an intersection (there was no intersection where the plaintiff attempted to cross) " unless such driver shall have first ascertained that such a movement can be made without obstructing traffic and can be made in safety having regard to . . . the traffic which actually is at the time or might reasonably be expected to be on the highway." There is also in force in British Columbia a Contributory Negligence Act not dissimilar in effect to, though predating, the United Kingdom statute.

The driver of the tram in his evidence alleged that he did not see the plaintiff's car until he was past Heather street, an intersection about 75 feet away from the point of impact, although the view was admittedly unobstructed. He then applied his brakes and sounded his gong but could not avoid the accident.

The plaintiff's claim for damages was tried before Wood J. and a common jury. Wood J.'s charge to the jury occupied fifteen pages of the record, and during its course he referred to *Davies* v. *Mann* (1842) 10 M. & W. 546. The jury found that the defendants were guilty of negligence in that " the brakes were not applied in sufficient time and the motorman (*i.e.*, the driver of the tram), neglected to keep a proper lookout." To the question " was the plaintiff guilty of negligence which contributed to the accident?"—which is incidentally a very good way of framing the question in such a case—they answered "No." Judgment was accordingly entered for the plaintiff for $20,688.55, and costs. On appeal, the Court of Appeal for British Columbia set aside the verdict of the jury, found the plaintiff and defendants equally to blame, and apportioned the damages accordingly. All the judges of the Court of Appeal were of opinion that there had been misdirection of the jury and one of them also held that the verdict of the jury was perverse.

On further appeal, the Judicial Committee (Viscount Simon, Lord Normand, Lord Oaksey and Lord Tucker, the judgment being delivered by Lord Tucker) reversed the Court of Appeal's judgment, and restored the verdict of the jury and the judgment of the court of first instance in favour of the plaintiff.

Their Lordships again rehearsed the relevant parts of Viscount Birkenhead's judgment in *The Volute*, which indeed is threatening to become as much a *locus communis* in the matters of causation

as was previously the ass in *Davies* v. *Mann* itself. But apart from the now apparently inevitable appeals to common sense, their Lordships did make some observations of interest.

First, though they did not consider it necessary (p. 303) "to review the numerous authorities in which the so-called principle of *Davies* v. *Mann* (which in the present context amounts to no more than that the mere fact that the plaintiff's motor-car was wrongly on the track does not necessarily mean that the plaintiff has no cause of action) has been discussed"—still, they did go on to add (p. 304):

"It suffices to state that this principle remains unaffected by the British Columbia Contributory Negligence Act and other similar enactments, though it may be that in practice this legislation may have tended to encourage the application of those broad principles of common sense in the apportionment of blame unless the dividing line is clearly visible."

Secondly, they decisively rejected the contention (which was put to them by counsel for the respondents and which has been heard of elsewhere) that where the misdoings of the two parties are relevant to the occurrence of the accident one of them can be solely liable *only if* he (a) actually knew of the dangerous situation created by the negligence of another and, (b) failed by the exercise of reasonable care thereafter to avoid the danger. "It can hardly be the consequence of such a collision," they said (p. 302), "that . . . by failing to keep a good look out until it was too late to avoid the accident the measure of the respondent's liability would be reduced." They also (p. 299), deprecated attempts "to classify acts in relation to one another with reference to time or with the regard to the knowledge of one party . . . and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable," though it is admitted that "time and knowledge may often be decisive factors."

Thirdly, and perhaps cardinally, they held both that the trial judge's direction which correctly recited the facts and results of *Davies* v. *Mann* did not amount to a misdirection and also (p. 303) that "the jury were entitled to come to the conclusion, taking a broad view of the case as a whole, that the negligence of the motorman was in the circumstances the sole cause of the accident irrespective of the precise moment at which he became aware of the danger." It is suggested that it is precisely because their Lordships held that this was a *possible* verdict—differing in this from the British Columbia Court of Appeal—that they held that there was not a misdirection whereas the lower court held that there was. Thus not only is the "principle" in *Davies* v. *Mann* good law

but a recital of that celebrated donkey's misfortune is still effective actually to fix upon one wrongdoer sole responsibility for an accident to the occurrence of which the other party's misbehaviour was relevant.

It is satisfactory to note that in *Sigurdson's* case we have been spared any observations upon the question whether the plaintiff's negligence was continuing or not. In spite of some apparent authority to the contrary—which was recently given further currency in the opinions of the House in the *Boy Andrew Case* [1948] A.C. 140—it should be self-evident that, at any rate in the normal collision case, the plaintiff's negligence, if relevant at all to the occurrence of the accident, necessarily continues up to the moment of the accident. Sigurdson necessarily continued to be at fault whilst he continued to lie wrongfully astraddle the track, just as much as the owner of the donkey continued to be in breach of his duty so long as it remained hobbled in the highway. The interest of *Sigurdson's* case, as much as of *Davies* v. *Mann*, lies precisely in the fact that despite the continuance of the plaintiff's negligence up to the moment of impact the defendant is held solely responsible for the collision.

It is no doubt bad luck that the British Columbia Electric Railway should for a second time have the privilege of exemplifying the principle of sole responsibility which they had so startingly demonstrated in *Loach's* case. One of the morals of *Sigurdson's* case as contrasted to *Stapley's* case, *supra*, is that it may still be of some importance to have a jury verdict in a collision case. The Judicial Committee stated that their decision should not be taken as in any way indicative of " what view they might have formed on the facts if it had been open to them to review the evidence and retry the case." The House of Lords showed less reluctance to interfere with the findings of the judge sitting without a jury in *Stapley's* case.

C. J. Hamson.

Tort—Master's Vicarious Liability to Spouse of Servant

The question arising in *Broom* v. *Morgan* [1953] 1 Q.B. 597 (C.A.) was exceedingly simple: if a servant during the course of employment negligently causes personal injury to a third party, does the fact that the third party happens to be the wife of the servant enable the master to escape his otherwise clearly established liability to her? To this question all the judges concerned answered " No." The simplest reason for this answer is that which has been already given in the United States and in Australia, namely, that although

a wife cannot sue her husband in tort for personal injuries, her inability is the result of an immunity purely personal to her husband. The husband in fact has committed a tort against her. If committed in the course of employment, the husband's master is vicariously responsible for it. The husband's immunity, being purely personal, does not extend to protect the master also. Such a reason may no doubt be bad history (for perhaps a husband could not have committed a tort against his wife at all), but it seems to be good law, at least since the Married Women's Property Act, 1882; for as Singleton L.J. says (p. 604) of section 12, " The natural reading of that is that there can be a tort as between husband and wife, but neither husband nor wife is entitled to sue the other for a tort."

All the judges concerned did adduce such a reason for their answer. Had they all been content to rely exclusively upon such a reason *Broom* v. *Morgan* could have been dismissed as a reaffirmation of the point already decided in *Smith* v. *Moss* [1940] 1 K.B. 424, in England, and in several other cases in other common law jurisdictions. However, Denning L.J. in the Court of Appeal (induced in some measure by the Lord Chief Justice's judgment in the court below, reported [1952] 2 All E.R. 1007), took advantage of the occasion to review generally the nature of a master's liability. General reviews of this kind are inclined to cause a good deal of trouble.

Denning L.J.'s main point (p. 609) is that in general " the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done." The master's liability is thus always to be based on the master's " personal default " in the sense which Lord Wright analysed in *Wilsons & Clyde Coal Co., Ltd.* v. *English* [1938] A.C. 57. Such a basing of the master's liability generally would, as counsel for the appellant argued, conflict with the numerous cases, many of them decisions of the House of Lords, in which a distinction was taken, where fellow servants were concerned, between a master's vicarious liability properly so called for some neglect by a servant (when he would not be liable in respect of injury caused to a fellow servant in common employment) and a master's personal default (where he would be liable even though the neglect was immediately a fellow servant's neglect); for, upon the view now proposed, any neglect by a servant in course of employment is always necessarily a neglect personally by the master. Denning L.J. was, however, prepared to disregard these cases on the ground that the doctrine of common employment (p. 609) " has now been abolished by statute and should be disregarded in the same way as if it had never been enunciated.

Statute law and common law should be integrated as one law." The desire to have coherence in the law is wholly admirable; the attempt to " make a pacification " on this scale is notable.

The proposed new formulation of the basis of the master's liability may well have the effect of altering the *nature of the duty* cast upon defendants generally. Denning L.J. suggested (p. 608) that the owner of a lorry is liable for his servant's casual negligence in driving it because " he is himself under a duty to see that care is exercised in the driving of the lorry on his business." Now a duty " to see that care is exercised " has frequently been contrasted to a duty " to take care "—very pithily by Langton J. in the *Pass of Ballater* [1942] P. 112, 117, and more at large by Bailhache J. in *Phillips* v. *Britannia Hygienic Laundry Co., Ltd.* [1923] 1 K.B. 539, 556. Indeed the term " duty to see that care is taken " is now generally used as a synonym for " strict " duty, as contrasted with the lesser duty in negligence " to take care." It seems as if the master's liability for the casual negligence of his servant in driving his lorry can be made a personal liability (instead of a vicarious one which it is now usually regarded as being) only if the master's duty in respect of his lorry is converted from a duty in negligence to a strict duty. It is not today a strict duty: if the owner of a lorry entrusts its repairs to a competent and independent firm of engineers and those engineers negligently repair it so that an accident is caused upon the highway without the negligence of the owner, the owner is not liable even if the owner himself is driving it : see *Phillips*' case (*supra*). But undoubtedly the owner would have been liable for the engineers' default if his duty had been of the order " to see that care is exercised." The owner of the lorry is liable for his servant's casual negligence when driving it on the owner's business not because the owner has a strict duty in respect of the lorry and is, therefore, as such, liable for a personal default, but precisely because, though he is *not* under a strict duty, he is *vicariously* liable for the default of his servant in course of employment. In such cases it is not the nature of the master's duty which makes the master liable; it is the existence of the relationship of master and servant between himself and the person actually at fault. Thus if the lorry owner employs his servant to repair his lorry, he will be liable for the damage caused to third parties by his servant's negligent repair; if he employs a competent independent contractor he may, as the law now stands, escape liability. In those cases in which the liability of the master arises only because of the existence of the relationship of master and servant, the liability has heretofore been described, and is still properly describable, as vicarious. It seems mistaken to

attempt to base all vicarious liability upon the pre-existence of a strict duty.

Denning L.J.'s approach is more traditional where he suggests (p. 609), that what is to be imputed to the master is not the *tort* as such of the servant, but the servant's *act or omission*. There is a good deal of authority for this approach, though no doubt much of the authority depends from the doctrine of express or implied command, the doctrine which is also the reason why the master was, and still is, treated as a joint tortfeasor with the servant. The command had originally to be express—it was only because the master commanded the act and was in truth a joint tortfeasor that the master was liable at all. But the command theory, even in the refined and rarefied form of implied command, began to be difficult at least as early as *Limpus*' case (1862) and is really not very serviceable since *Lloyd* v. *Grace Smith & Co.* (1912). It has now been generally discarded in favour of the course of employment doctrine and it is at least doubtful if there is any point in resurrecting it. And even on the command theory, the act or omission is imputed to the master not because the master's personal duty is strict but because the relationship of master and servant exists between him and the person whose act is imputed to him.

It is most desirable that the circumstances in which one person is to be held civilly responsible for the act or omission of another should be reconsidered, and especially that we should reconsider the distinction between servant and independent contractor which we almost automatically use in this context. But though such a reconsideration is desirable, and though it may be argued that it is in some sense advanced by the comments made in this case, yet the actual reformulation proposed appears to be insufficient and, in particular, is altogether too casual. The restatement, almost *obiter*, of important principles of law is not desirable. Much evil has been done in the name of a hopelessly exaggerated doctrine of precedent: of which *Jacobs* v. *L. C. C.* stands as the forbidding monument. The remedy is not, however, to be found in a refusal to maintain a certain measure of stability in the principles of our law. We really must avoid combining narrowness in detail with looseness in principle, as seems to be the present tendency; for, so doing, we make the worst of both possible worlds and succeed in securing for ourselves all the disadvantages of a strict, and none of the benefits of a rational, doctrine of precedent.

C. J. Hamson.

TORT—VICARIOUS LIABILITY FOR "AGENT"

THAT the owner of a motor-car may be responsible for damage caused by the negligent driving of a person not his servant, even though not himself in a position to exercise control over the driver, has been known to the law at least since the decision in *Parker* v. *Miller* (1926) 42 T.L.R. 408, but the precise incidence of the liability has only recently become plain. In *Parker* v. *Miller* itself Scrutton L.J. seems to have been content to hold the owner liable on the sole ground that he had retained the right to control, and it is plain that unless that right exists the owner cannot be liable (see *Chowdhary* v. *Gillot* [1947] 2 All E.R. 541). *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, however, showed that the retention by the owner of the right to control was not by itself enough. In that case, though he evidently retained the right to control, the owner had no interest in the performance of the journey, and was for that reason held to be free from responsibility. In *Ormrod* v. *Crosville Motor Services* [1953] 1 W.L.R. 409, affirmed [1953] 1 W.L.R. 1120, both elements were present. The car was being driven at the time of the accident by a friend of the owner on a journey to Monte Carlo, where it was intended that the owner and the driver should meet, preparatory to spending a holiday together in the car. On his way to Monte Carlo, and before leaving England, the driver became involved in an accident due in part to his own negligent driving, and both Devlin J. and the Court of Appeal held that the owner was liable.

The owner's liability may, therefore, be stated to depend upon the co-existence of interest in the journey in question and the retention of the right to control, but its true place in the law is not easy to discover. Salmond (11th ed., p. 101) considers that the driver may be regarded as a servant of the owner, although the service be both temporary and gratuitous, but this seems an awkward application of the notion of service, and appears to ignore the requirement that the owner must have an interest in the journey (see Hanbury, *Principles of Agency*, pp. 185–6). In the cases, and notably in *Ormrod* v. *Crosville Motor Services*, the driver is described as the agent of the owner, but this too, it is submitted, is not altogether satisfactory. Normally, the test of a principal's liability in tort as well as in contract is the extent of his agent's authority or apparent authority, but such considerations are wholly out of place in cases of negligence. (See especially *per* Lord Greene in *Uxbridge Permanent Building Society* v. *Pickard* [1939] 2 K.B. 248, 254. Professor Hanbury (*op. cit.*, p. 10), goes so far as to suggest that the use of the word "agent" in this class of case

may even be dangerous.) On the whole, therefore, it would seem that Winfield's approach (5th ed., p. 121), that these cases form a special category is the most satisfactory. It is neither agency nor master and servant, though having affinities to both, and may well be described, as it is by Winfield, as "casual delegation."

In *Ormrod* v. *Crosville Motor Services* Denning L.J., while agreeing with the result, enunciated a strict duty which, he said, rests upon the owners of motor-cars. The law, he said, imposes an especial responsibility upon the owner of a vehicle who lets it out on the road in charge of some one else, no matter whether it is his servant, his friend, or anyone else. Only if the vehicle is used for purposes in which the owner has no concern does he escape liability. Such a principle may, perhaps, be the logical result of a comparison between the class of case under discussion, and *Barnard* v. *Sully* (1931) 47 T.L.R. 557, where it was held that the fact of ownership of a car involved in an accident is prima facie evidence that it was being driven by the owner, his servant or his agent. It is submitted, however, that such a rule is at the same time too strict in its result and, at least if limited to motor-cars, too narrow in its application. In the case of motor-cars the law furnishes the injured party with ample remedies without recourse to such a doctrine—if the driver is a man of no means and the insurance cover inadequate, the owner may be sued on the principle of *Monk* v. *Warbey* [1951] 1 K.B. 75—while its useful extension to cases involving other chattels (as *e.g.*, in *The Endymion*, *The Times*, November 11, 1953), would not be possible.

J. A. Jolowicz.

TORT—CONTRIBUTION BETWEEN TORTFEASORS—LIMITATION

Three related problems have occupied the courts in a line of cases culminating in *Littlewood* v. *George Wimpey & Co., Ltd.* [1953] 2 Q.B. 501. The standard situation is this. The plaintiff, P, has been injured by the concurrent negligence of two persons, whom we will call D1 and D2. P sues D1, and D1 claims contribution from D2, either under the third-party procedure or by separate action. P's claim against D2, if he urged that, would be subject to a shorter period of limitation than the usual six-year one. For instance, D2 may be a public authority in respect of whom P's claim must be brought within one year (Limitation Act, 1939, s. 21). Or P may be suing for the loss of a breadwinner under the Fatal Accidents Act, 1846, in which event, by section 3 of

that Act, his action must be brought (whether against D1 or against D2) within a year of the death. The three legal problems are: (1) what period of limitation is applicable to D1's claim for contribution against D2; (2) when does the period start to run; and (3) does it matter that, at the time of D1's claim, P is barred against D2?

(1) *What period of limitation is applicable to a claim for contribution?* Where P's claim is under the Fatal Accidents Act, this question was answered by Donovan J. in *Morgan* v. *Ashmore, Benson, Pease & Co., Ltd.* [1953] 1 All E.R. 328. He held that the relevant period for D1's claim was not the restricted period of one year from the death. Apparently, though the learned judge refrained from deciding the point, the period was the ordinary six-year period under the Limitation Act, 1939.

At first a contrary view was taken where D2 was a public authority. Birkett J., as he then was, held that the one-year period ran in D2's favour not only on the claim by P but also on the claim for contribution by D1 (*Merlihan* v. *A. C. Pope, Ltd.* [1945] 2 All E.R. 449). The validity of this decision depends on the interpretation of section 21 of the Limitation Act, 1939, which extends to actions "for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution" thereof. It might be argued that an action for contribution is not an action "for" or "in respect of" any of these acts, or at any rate is not solely in respect of them: it is not an action for a tort or for a breach of contract or for any other wrongful act, but is merely an action to enforce a statutory right of contribution. This is borne out by the decision of Donovan J., noticed above, for he held that the action for contribution is not brought in respect of the death of a person within the meaning of the Fatal Accidents Act. The same view commended itself to Denning and Morris L.JJ. in *Littlewood's* case, above, for they expressed the opinion, *obiter*, that a claim for contribution against a public authority is subject only to the six-year period. In arriving at this opinion they applied *Tuckwood* v. *Rotherham Corporation* [1921] 1 K.B. 526, where the principal claim and the claim for contribution were under the Workmen's Compensation Act. Singleton L.J., however, disagreed, going back to the opinion of Birkett J. in *Merlihan's* case.

(2) *When does the cause of action for contribution arise?* This question was of great importance in the days when the view was taken that the claim for contribution might be barred after the lapse of only one year. Birkett J. in *Merlihan's* case held that

the period commenced to run in favour of a public authority at the time of the accident. Combined with his view that the period was only one year, this decision operated to create hardship, for if P sued D1 (the private defendant) more than one year after the accident, D1's claim for contribution against D2 (the public authority) would be barred before it ever arose. Also, Birkett J. was not referred to the formidable authority that exists in other parts of the law for saying that on a claim for contribution the "cause of action" arises only when the liability of the claimant for contribution is ascertained or the damages paid, whichever is the earlier (see, *e.g.*, *Collinge* v. *Heywood* (1839) 9 Ad. & El. 633; *M'Gillivray* v. *Hope* [1935] A.C. 1). In *Hordern-Richmond, Ltd.* v. *Duncan* [1947] K.B. 545, Cassels J. expressed doubt about Birkett J.'s decision; and in *Littlewood's* case Denning L.J. expressed the opinion, *obiter*, that it was wrong; on this point Singleton L.J. sided with him, Morris L.J. disagreeing. If one adds to the opinion of Denning and Singleton L.JJ. that of Parker J. in the court below ([1953] 1 W.L.R. 426), one may safely say that the preponderating judicial opinion is now against *Merlihan's* case.

(3) *Does it matter that, at the time of the claim for contribution, the injured party cannot sue the person from whom contribution is claimed?* Taking the situation given at the beginning of this note, suppose that P's action against D1 is brought thirteen months after the accident, and that D1 then claims contribution against D2, who at that moment is immune from an action by P, either because D2 is a public authority, or because P's claim is under the Fatal Accidents Act. Can D1 maintain his claim for contribution? The answer to this turns upon the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*), which is the statutory authority for allowing contribution between tortfeasors. The Act provides that "any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage." Can it be said that D2 "is, or would if sued have been, liable" to P? The fact is that D2 is not now under an enforceable liability to P, but he would have been under such liability if sued *in time*. Can the words "in time" be implied into the section? Birkett J. in *Merlihan's* case expressed the opinion that they could not be implied; Donovan J. in *Morgan's* case held that they could. In *Littlewood's* case, Singleton and Morris L.JJ., with Denning L.J. dissenting, held that they could not.

The particular way in which the question arose in the last case

was as follows. P was injured by the concurrent negligence of D1 and D2, the latter being a public authority. P sued both defendants, but failed against D2 because his action was out of time. He succeeded against D1 who claimed contribution against D2. Cassels J. and the majority of the Court of Appeal held that the action failed; it did not come within the terms of the Tortfeasors Act, because D2 had actually been sued by P, and had been held not to be liable. They construed the word "liable" in the Act as having a peculiar double meaning. Where it first occurs, it means "liable in law, whether judgment is obtained or not." Hence a tortfeasor who settles a valid claim out of court can get contribution. But where the word "liable" occurs a second time, it means "held liable, or would have been held liable if sued," and the words "in time" cannot be implied. This awkward construction leads to injustice, for it means that D2's claim for contribution is thwarted by the conduct of P in not making his own claim within the statutory period. It would be superfluous to repeat here Denning L.J.'s weighty arguments for his dissenting opinion.

What is the scope of the decision in *Littlewood's* case? Denning L.J. assumed that it was confined to the situation where P actually sued D2 out of time. He said: "It was conceded on behalf of [D2] that, if the injured man had not sued [D2] at all, [D1] could have got contribution; but, it is said, as he sued [D2] and failed, [D1] cannot get contribution." However, on the construction adopted by the majority, it seems that D1 could not have got contribution even if P had not unsuccessfully sued D2. What defeated D1 was the fact that, on the expiry of the one-year period, D2 was no longer liable to P within the meaning of the Act.

The present law, as it results from these authorities, may be summed up by taking three situations.

(i) P sues D2 within the year and obtains judgment which is not satisfied. P then sues D1 after the year and obtains satisfaction, D1 claiming against D2 for contribution. According to the prevailing opinion the claim will succeed, for D2's liability to P has been fixed by judgment, and the period of limitation for D1's claim to contribution is six years from the date of the judgment against D1 or satisfaction by him.

(ii) P sues D1 after the year and obtains satisfaction, D1 claiming against D2 for contribution. If P is then statute-barred against D2, D1 will be barred also, for D1's claim for contribution is dependent on the existence of an effective claim by P or rather

upon the existence of a claim by P that would be effective but for D1's satisfaction of it.

(iii) An intermediate situation is possible. P sues D1 eleven months after the accident. D1 claims contribution against D2 thirteen months after the accident. Morris L.J. in *Littlewood's* case suggested that the claim may succeed, for the statute may be read as covering the case where D2 would have been held liable if he had been sued *at the time when D1 was sued.*[1] The result is a just one, but it seems peculiar that the learned Lord Justice was prepared to contemplate the implication of all these words into the Act, when he refused to imply the simple phrase " in time."

The fact is that some temporal words must be read into the Act, in order to make sense of it. Denning L.J. wishes to imply " in time." Morris L.J. was apparently prepared to support the implication just mentioned. Singleton L.J. seemed to suppose that the Act could be read without implication, but in truth his judgment presupposed quite a lot of implication, namely that the defendant to the claim for contribution " is, or would if sued [at the time when the claim for contribution was made (and apart from the satisfaction by the claimant for contribution)] have been [held] liable." It is hard to see how the literal rule of interpretation, invoked by Singleton L.J., can justify the words here placed in square brackets. The literal rule does not choose between competing implications, when some implication is necessary. One might have thought that the implication selected by the court would have been governed by general notions of justice and the broad policy of the Act.

The decision in *Littlewood's* case has a wider importance than for claims barred by the statutes of limitation. It means that an " unenforceable liability " to the injured party is never a foundation for a claim to contribution under the Tortfeasors Act. And it apparently means, as Denning L.J. pointed out, that the injured party can defeat the right of contribution under the Act, and victimise one tortfeasor by releasing the other tortfeasor before suing the first. *Littlewood's* case is yet another indication of the need for overhauling our apportionment legislation.

GLANVILLE L. WILLIAMS.

[1] Or, presumably, at the time when D1 settled without action, if such was the fact. Morris L.J. seems to have contemplated the possibility that if D1 settled without being sued, even after the one year, he might have a claim against D2 for contribution, although P was then barred against D2; but it is difficult to reconcile this with the rest of his judgment.

TRUSTS—REMUNERATED TRUSTEESHIP AS AN "OFFICE OF PROFIT"

It has long been a fundamental rule of the law of trusts that a trustee cannot receive any remuneration for his services unless authorised so to do by the trust instrument or by the court. This rule has been associated with the wider principle of equity which precludes persons who occupy a fiduciary position from making an unauthorised profit. A great number of them, such as agents and partners and directors of companies, are entitled to a remuneration *ex contractu*. But it would appear that, until comparatively recent times, trustees and executors were seldom authorised by their trusts or wills to charge for their services. The office of trustee or executor has thus come to be regarded as essentially an honorary office and, in consequence, any remuneration which the trust or will prescribes is regarded by equity merely as a bounty. Thus, a remuneration given by a will is treated as a mere legacy: it therefore fails if the executor or trustee attests the will (*Re Pooley*, 40 Ch.D. 1, following *Re Barber*, 31 Ch.D. 665), or if the estate is insolvent (*Re White* [1896] 2 Ch. 217); and when effective it was liable to legacy duty (*Re Thorley* [1891] 2 Ch. 613, C.A.; and *Commissioner of Stamp Duties of New South Wales* v. *Pearse* [1954] 2 W.L.R. 5).

Similar reasoning has been applied, in income tax law, to non-professional trustees who are entitled by virtue of the trust instrument or will (or by order of the court or covenant of the beneficiaries) to a periodic remuneration from the trust—*e.g.*, £500 a year whilst continuing as trustee. In such cases the trustee has not been regarded simply as a person earning a fee for work done, and so he has not been directly assessed (under Schedule E) for the appropriate tax: instead, he has been treated as having an "annuity or other annual payment" charged upon the trust, and so (under rule 19 of the All Schedules Rules) the trust pays him his remuneration *less the tax upon it*: see *e.g.*, *Baxendale* v. *Murphy* [1924] 2 K.B. 494; *Hearn* v. *Morgan* [1945] 2 All E.R. 480. Thus the idea that any authorised remuneration for a trustee is a mere bounty, and not a fee for his services, has operated in this respect to the advantage of the beneficiaries: *Dale* v. *I. R. C.* [1952] Ch. 704, 712.

Such was the background of *Dale* v. *Inland Revenue Commissioners* [1954] A.C. 11, in which the House of Lords held unanimously that £1,000 per annum free of tax, payable to a trustee (of an exceptionally arduous trust) so long as he continue to act as trustee, was "earned income" as defined by section 14 (3) of the Income Tax Act, 1918, and was therefore exempt from the

" special contribution " that had been imposed by the Finance Act, 1948. " Earned income," as defined by section 14 (3) of the Act of 1918, is income derived from an " office or employment of profit." The question, therefore, was whether an income which the law of trusts regards as a mere gift or bounty and which one aspect of taxation law had regarded likewise, converts a trustee's office into one " of profit." The Court of Appeal [1952] Ch. 704, had held unanimously that it does not: in law the office of a trustee is honorary; accordingly, any remuneration given to him derives from the gift and not from the office. The House of Lords, however, held that the natural meaning of this statutory definition is clear: whatever the rules of equity may be as between trustee and beneficiary, the office of a trustee who is remunerated is according to ordinary language an office " of profit "; and this is so although in law his remuneration comes to him—unlike ordinary remuneration based upon contracts of service—by a gift conditional upon his continuing service in that office. Accordingly, upon the natural construction of the relevant statutory provisions, he holds an " office of profit " for the purposes of this aspect of taxation law; and, since those provisions are unambiguous, it would be wrong to take into account the decisions upon the construction of other provisions of the taxing statutes (whereby, as above, a trustee's remuneration has been held to be payable less tax) or the possibility that the result may have an impact upon them.

That the House of Lords here reversed unanimously a unanimous decision of the Court of Appeal founded upon the established law of trusts, need cause no anxiety. No one denied that the office of trustee is prima facie an office of honorary service. The contest was as to whether, when a trustee properly receives a remuneration, it is " remuneration *from* any office . . . of *profit* " within the meaning of section 14 (3) of the Act of 1918. The Court of Appeal applied the established fiction that such remuneration is a (conditional) gift. But the House of Lords concentrated upon the natural meaning of the statutory phrase and held that the fiction makes no difference; for (as Harman J. had indicated at first instance—[1951] Ch. 893, 897) even when one regards the trustee's remuneration as a gift conditional upon his undertaking the duties of trusteeship, one may naturally say that by serving as trustee he " earns " that remuneration.

So far as the rules of the law of trusts are concerned, the difference of opinion was largely a difference of emphasis. The Court of Appeal, emphasising the general rule that a trustee cannot make a profit, had tended to ignore the force of the established exceptions to that rule. Evershed M.R. had said (at p. 716) that

the office of trustee " itself involves a negation of any right to make a profit out of its performance." Lord Normand (on the Woolsack), however, held (pp. 26–27) that this " incorrectly described the fiduciary duty of trustees "; and he then proceeded to equate trustees with other persons who have a fiduciary duty, such as tutors and curators in the civil and Scots law and partners and agents : " The rule is the same for all : it is not that reward for services is repugnant to the fiduciary duty, but that he who has the duty shall not take any secret remuneration or any financial benefit not authorised by the law, or by his contract, or by the trust deed under which he acts."

If this means that the duty in one fiduciary situation is no higher than that in another, it is an important matter of principle and may encourage a further simplification of what is at present a somewhat troublesome aspect of our law. Lords Oaksey, Reid and Cohen (though not Lord Morton) expressly agreed with Lord Normand's speech. Nevertheless, it is arguable that his equation of trustees with other fiduciary persons was not a necessary part of the decision. Lord Cohen, moreover, stated explicitly (at pp. 34–35) that, in his opinion, their lordships' decision would not " detract from the fundamental principle of equity law that a trustee cannot receive anything for his services " unless authorised by the trust instrument or by the court.

S. J. Bailey.

GIFT—PARENT AND CHILD—ADVANCEMENT—EVIDENCE

Out of the complicated facts of *Re Shephard, Shephard* v. *Cartwright* [1953] 1 Ch. 728 (C.A.), two main questions may be extracted. First, whether a father had made such an out-and-out transfer of property to his children as would amount to advancements. Secondly, if this had in fact happened, whether evidence of the father's subsequent acts or conduct was admissible to rebut the presumption of advancement.

The transactions out of which these questions arise began in 1929, when a father promoted certain private companies and caused the greater part of the shares to which he was entitled to be allotted to his children, though they knew nothing of this. The fact that the children were told nothing of this transaction was not entirely novel, for some years earlier the father had both registered and carried on businesses in the names of his children without their knowledge. But it was this allotment of 1929 on which the children relied as establishing an advancement to them, and as providing an answer to the first question.

In 1934 there began a series of transactions on the part of the father which are the subject of the second question. In that year the father promoted a public company which acquired the shares in the private companies and paid for them partly in cash and partly in shares in the new company. The children signed the sale agreement but in these proceedings denied knowledge of the transaction. The father then procured authorities from the children to the company to pay the cash consideration to him; this was done and these sums the father placed to his own bank account, but later transferred them to deposit accounts in the names of his children. The father then sold the shares registered in the names of his children and paid the amounts received to their deposit accounts, but at the same time procured from the children mandates authorising the bank to honour any withdrawals made by him from those accounts. By the end of 1935 he had withdrawn and used for his own purposes the whole of the amounts in those accounts.

In 1935 the father promoted an estate company, and most of the money withdrawn from the children's deposit accounts went to buy property in that company's name, and the children's names were entered in the books of the company as creditors for large sums. And soon afterwards the father purchased house property in the names of his children, and though they were aware both of the loan accounts in the estate company and of the house purchases in their names they remained ignorant, until the testator's death in 1949, of the original allotment of shares in 1929. On learning of the allotments of 1929 and of the consequent dealings with the proceeds of their sale, two of the children claimed against the executors an amount representing the proceeds of the sale of those shares: their claim would have more than exhausted the father's estate, and it was opposed by the third child, the eldest son.

In answer to the first question, all three members of the Court of Appeal were agreed that the plaintiffs had failed to discharge the onus of establishing that the father intended to make absolute and unqualified gifts of the shares to them. The Master of the Rolls thought that the father intended to confer some kind of benefit on the children, but it was of a qualified character leaving the testator "a power of control, if necessary a power of revocation, a 'dominion' over the subject-matter" (p. 750). "Any advancements which the plaintiffs can establish were not of such an absolute character that the testator's estate is now accountable for all sums withdrawn from the relevant deposit accounts" (p. 751). Denning L.J. was of opinion that the father never intended to make them a gift at all, but always intended that the shares and their proceeds should belong to him. Romer L.J. thought that the father "did

intend to confer a benefit upon them, but one that was future, nebulous and subject to an overriding control which was to remain vested for an indefinite period in himself" (p. 765).

On the second question, whether evidence of the father's subsequent acts was admissible to rebut the presumption of advancement, there was an interesting divergence of opinion. Romer L.J. thought that the statement of the law in the textbooks was correct, namely, that subsequent acts as well as subsequent declarations by a parent are inadmissible in general and the reason for their rejection is the ease with which they can be manufactured by the parent for his own ends. Nevertheless, certain categories of subsequent conduct were admissible for this purpose : first, evidence of acts of the father which were against his interest, for these were admissions; secondly, acts so associated with the original transaction as to form part of it; thirdly, acts tending to show a course of dealing between the parties. And he said he regarded the acts of the father in this case as admissible under the second head, being "events which are so associated with the original transaction as, in effect, to form part of the terms of that transaction" (p. 768). On the other hand, Denning L.J. thought that the textbook statements were incorrect and said that a distinction must be drawn between subsequent acts and subsequent declarations, and that in order to ascertain a man's intention, evidence is admissible, "not only of the nature of the act and his contemporaneous statements which are part of the transaction, but also of any subsequent acts and conduct on his part which throw a light on his intention . . . . It is much better to have a simple rule like this . . . rather than a rule of exclusion, which is subject to numerous exceptions . . . ." (p. 761).

Evershed M.R. preferred not to express any final opinion on the question but did say that if the matter were free from authority the other way (*Sidmouth* v. *Sidmouth* (1840) 2 Beav. 447; *Christy* v. *Courtnay* (1849) 13 Beav. 96), he would be disposed to agree with the distinction between subsequent acts and subsequent declarations drawn by Denning L.J. In any event, since evidence had been admitted of such subsequent conduct of the father as showed recognition or affirmation by him of the alleged gift, such parts of the story as tended in the opposite direction could not properly be excluded. "It cannot be legitimate to pick out such parts of the whole narrative as support the plaintiff's claim in isolation from their context" (p. 752).

The principle propounded by Denning L.J. has not only simplicity to commend it, but also appears to be in line with the principles applicable to ordinary gifts *inter vivos*. It is difficult to see why the subsequent conduct of the alleged donor should be

freely admissible in gifts *inter vivos*, and yet totally excluded, or admissible only in exceptional circumstances, when the alleged gift arises through the presumption of advancement. In both cases it would seem that the crucial question is what was the true intention of the donor. As Evershed M.R. observed, the Court of Appeal in the recent case of *Re Freeland*, *Jackson* v. *Rodger* [1952] Ch. 110, received evidence of the subsequent conduct of the alleged donor which tended to disprove an intention to make an out-and-out gift.

T. C. Thomas.

SETTLED LAND—MAINTENANCE FUND—GIFT OVER ON SALE

Re Aberconway's Settlement Trusts [1953] 1 Ch. 647 is the latest of a line of decisions on the effect of section 106 of the Settled Land Act, 1925. Lady Aberconway, an ardent horticulturist, owned a mansion-house and gardens at Bodnant. In 1921 she settled the rest of her Bodnant estate on her husband for life with remainders over. In 1926 she settled securities on the 1921 trusts, but directed that if the gardens should ever be held on the 1921 trusts, then for as long as they should be so held the income should be applied up to the limit of the perpetuity period for the maintenance of the gardens, and thereafter upon the trusts of a different settlement made in 1909. She died in 1933, having by her will settled the house and gardens on the 1921 trusts. Her son, also an eminent horticulturist, became life tenant in 1934 when his father died, but was unable to maintain the gardens owing to taxation, and in 1949 sold five-sixths of them to the National Trust, expecting to devote the 1926 trust income to the remaining sixth. The trustees of the 1909 settlement contended, however, that the gift over came into operation, as a substantial part of the gardens was no longer settled on the 1921 trusts, and the Court of Appeal by a majority so held, reversing Danckwerts J. who, considering the gift over to be void under subsection (1) (*b*) of section 106 of the Settled Land Act, 1925, had decided that the income was still applicable to the gardens.

Section 106, and its predecessor section 51 of the Act of 1882, prohibits limitations of settled land or any other property that tend to induce the life tenant to abstain from exercising his Settled Land Act powers. Both courts were ready to apply it, although the suspect provision was in a document prior to the one conferring those powers—a sensible view, as doubtless the settlor, when executing the 1926 trust, contemplated ultimately devising the house and gardens on the 1921 trusts. There was authority that

section 51 could avoid a provision in a document subsequent to that conferring the powers.

The Court of Appeal had not previously had to consider the effect of gifts over of indirect benefits, conferring nothing upon the life tenant in cash or kind while in possession, yet saving him expenditure on the settled property which he must otherwise bear. Puisne judges had given conflicting decisions in cases where a testator had given the use of a house for life to a female relation, his estate to pay the rates, taxes, outgoings and repairs during her residence. Byrne J. in *Re Trenchard* (1900) 16 T.L.R. 525, held that even after sale she would be entitled to an annual sum equal to that previously spent on rates, etc., but in *Re Simpson* [1913] 1 Ch. 277, Swinfen Eady J. refused to follow that decision, holding that after sale the sum fell into residue. In *Re Patten* [1929] 2 Ch. 276, Mark Romer J. doubted *Re Trenchard*, but imposed a gloss on *Re Simpson*, holding that on exercise of the power of sale such a trust comes to an end by reason of the nature of the trust, but on exercise of the power of leasing such a trust continues, enabling the life tenant to obtain a higher rent by letting the house on a non-repairing lease free of rates, etc. Any gift over must, therefore, be read as taking effect only upon cesser of residence for any reason other than the exercise of the life tenant's power of leasing.

In *Re Burden* [1948] Ch. 160, Charles Romer J. followed *Re Simpson*. The question of his father's gloss in *Re Patten* did not arise, as the life tenant asked only whether the income would continue after a *sale* of the property. For the first time all the relevant authorities were cited, including *Re Ames* [1893] 2 Ch. 479, which is of special interest as a garden trust. In *Re Ames* the trust income was to be applied to maintaining a sea wall, the drives, plantations, orchards, woods and ornamental shrubberies on the settled estate, but was to fall into residue on cesser of possession. North J. held the life tenant still entitled to the income after he had sold. The primary object of the trust was the maintenance of amenities. Any balance was to go to the life tenant, but there had been no balance during the fifteen years before sale, and Romer J. rightly did not regard this as an element on which North J. proceeded, though he refused to follow the case.

In the instant case, Danckwerts J. applied *Re Patten*, holding that the gift over of the trust income tended to induce the life tenant not to exercise one of the Settled Land Act powers, namely the power of selling part of the land, and Denning L.J. took the same view. Evershed M.R. and Romer L.J. applied *Re Simpson* without regard to the modification in *Re Patten*, apparently because

a substantial recasting of the trusts would otherwise be required. They held that Parliament must be assumed to have known of the limitation put upon section 51 of the 1882 Act in *Re Simpson*, and since section 106 was a re-enactment, the courts had to construe section 106 as section 51 had previously been construed. In fact there were conflicting decisions before 1925 which Romer L.J. had himself examined in *Re Burden*, and the doctrine of Parliamentary omniscience about decided cases applies only when the judicial interpretation has been clear, unchallenged and authentic: *Barras* v. *Aberdeen Steam Trawling* [1933] A.C. 402; 58 Jur.Rev. 93. All that the legislature can be deemed to have done is to consolidate the doubt, and to leave the courts to put their own house in order.

On the merits of the case, the court rightly insists that an objective test must be applied in deciding whether a provision tends to induce a life tenant to abstain from exercising his powers. The provision in question would certainly have deterred Lord Aberconway from selling part of the land, had he appreciated the legal implications. He seems to be dismissed as a horticultural eccentric, but the standard of a reasonable man is never really substituted by the court. Ignoring the fact that the sale was to the National Trust, and remembering that it might have been for agricultural or industrial purposes, or for that matter for a sewage farm as in *Re Paget* (1885) 55 L.J.Ch. 42, would not a reasonable life tenant still require a "green belt" of fragrance and beauty between his residence and the industry?

Denning L.J., in a lucid and persuasive dissent, does not share the reluctance of the majority to tamper with the original trust, and insists that some modification is permitted of a provision which Parliament has declared void, otherwise the avoided provision will be re-established by saying that the letter of the original trust must be fulfilled. This view is particularly attractive in the circumstances, because any violence to the letter of the original trust would have resulted in fulfilling the settlor's intention, so far as the changed circumstances permitted.

Evershed M.R. observes of the "very generous language" of section 106 that it cannot have been the intention of Parliament to put an almost unlimited restriction on the power of persons desiring to make settlements. The intention of Parliament, to which this is the only reference in the whole line of cases discussed in this note, is thus used to justify modification of the admittedly wide language of section 106, but is not further elucidated. A literal interpretation is not being followed, presumably because the legislature is considered to have gone beyond the mischief aimed at, though even here the exponent of the literal school still construes

the language as it stands: *per* Scrutton L.J. in *Banbury* v. *Bank of Montreal* [1917] 1 K.B. 409, 432. Surely a court which is disregarding unambiguous words in a statute should voice its view of the legislative intention, not merely by reference to technicalities such as the doctrine of omniscience, but also by a consideration of the objects that led to the enactment in question so far as the mischief rule permits. If these objects had been examined, it might well have been found that the language of section 106 is so plain, because it is the very cornerstone of the Settled Land Acts.

By affirming *Re Simpson*, the Court of Appeal has opened the door to settlors desirous of discouraging sales of settled land. They have merely to provide a fund for rates, repairs, taxes, gardens, interior decoration, etc., to go over when the life tenant sells, and the larger the fund that can be provided the less likely will be a sale. As for the actual decision in *Re Aberconway*, the court seems to have ignored the clear text of section 106 in favour of some obscure intent of Parliament, but to have adhered to the letter of the garden trust in the teeth of the primary object of the settlor.

R. N. Gooderson.

SETTLED LAND—EMPLOYMENT OF CAPITAL MONEY—REPAIRS

May a tenant for life of settled land call upon the trustees to pay for current repairs out of capital money? It would shock the framers of the Settled Land Acts, 1882–1925, to know that in a wide class of cases the answer is now in the affirmative. This affront to the scheme of those Acts has been brought about by a freak of legislative draftsmanship in the Agricultural Holdings Act, 1948. Three recent cases (*Re Duke of Northumberland, decd.* [1951] Ch. 202; *Re Sutherland Settlement Trusts* [1953] Ch. 792 and *Re Lord Brougham and Vaux's Settled Estates* [1954] 1 Ch. 24) show that tenants for life are not hesitating to take the fullest possible advantage of the breach that has thus been made in the barrier which was intended to keep the trust capital out of their hands. Curiously enough the courts seem disposed to help them in exploiting it by construing the legislation generously.

This accidental revolution has been brought about in the following way. The Agricultural Holdings Act, 1923, provided that tenants could claim compensation for improvements carried out by them under certain conditions, and the improvements were specified in the first schedule to the Act, which was divided into three parts. In Parts I and II were listed various permanent

improvements. In Part III were listed less permanent improvements such as liming, manuring and—the important example in the present case—repairs which were not the tenant's legal obligation. Obviously the tenant will not be compensated for repairs which he is obliged to do by the terms of his lease; but in so far as he goes further and carries out what may be called "landlord's repairs" he has a fair claim which the Act recognises. Under the Settled Land Act, 1925, s. 73 (1) (iv), any improvement listed in Parts I and II of the Schedule to the Act of 1923 is eligible for payment out of capital money, and under section 75 (2) the tenant for life can of course give directions accordingly. So far no difficulty arises, for there is no power to apply capital money for the purposes of Part III. But the Agricultural Holdings Act, 1948, Third Schedule, substituted for the former three-part schedule a new two-part schedule, in which landlord's repairs are listed in Part II; and by section 96 it provided that references in any Act to Part II of the old schedule should in future be construed as references to Part II of the new schedule. Thus section 73 (1) (iv) of the Settled Land Act, 1925, must now be read as authorising the application of capital money for landlord's repairs as well as, for example, "planting of orchards or fruit bushes" and "the growing of herbage crops for commercial seed production"—three items which are clearly illegitimate according to the Settled Land Act's fundamental principle that capital money should be invested or applied only in ways which will permanently benefit the property and not merely put more income into the pocket of the tenant for life by relieving him of charges which by any rational system of accounting should fall upon income rather than upon capital.

It is extraordinary that the schedules to Agricultural Holdings Acts, which are compiled for purposes entirely different from those of the Settled Land Acts, should be made to govern the use of capital money. In the *Northumberland* case Vaisey J. stigmatised this "very inappropriate and inconvenient use of what may be called 'referential legislation,'" and observed how much easier it would have been to understand the objects of the legislature if they had kept these two very different matters separate. But, construing as best he could "this welter of confused and confusing enactments," he found that he had no option but to uphold the claim of the tenant for life that she could direct the trustees to meet out of capital money the large bills for repairs which had been incurred in and after 1945. It is only fair to add that these repairs were said to have cost more than the whole income of the estate in those years, and it may be guessed that they were due to the large arrears of repairs which accumulated during the war. But that does not

alter the fact that current repairs are not a proper charge against capital as between tenant for life and remainderman, or the fact that in years when repairs cannot be carried out a fund should be built up out of income for deferred repairs. The law pays no regard to the magnitude of the cost of repairs, and there is nothing now to stop capital money being run down by being used to pay, on current account, for the very wide class of agricultural repairs and other matters specified in the Act of 1948. This is making an important subsidy to the tenant for life at the expense of those entitled in remainder.

In the *Sutherland* case Harman J. refused to hold that this subsidy could be claimed in respect of repairs done before the Act of 1948 came into force. It will be seen that this conflicts with the more indulgent judgment of Vaisey J.; but Harman J. pointed to a mistake in his brother judge's reasoning which Vaisey J. later acknowledged in the *Brougham and Vaux* case. As to post-1948 repairs the learned judges were agreed, and Harman J. expressed himself forcefully on the subject. The items claimed to be charged to capital were, he said, "of a character which nobody would then (*sc.*, before 1948) have dreamed would have been payable out of capital," and he said that it was "a complete revolution of all ideas that lawyers have had for many years about the relation between capital and income under the Settled Land Act, 1925."

In the *Brougham and Vaux* case another application of the same kind was allowed by Vaisey J., and he added this further point, that capital money can be called for to pay for repairs even when there is a tenant who is legally responsible for doing them. Thus it is not only "landlord's repairs" but *all* repairs "to fixed equipment reasonably required for the proper farming of the holding" which the fortunate tenant for life may now have paid for by the remainderman. This extension is surprising, for Harman J. in the *Sutherland* case (at p. 804) had already stated his opinion to the contrary, and it must surely be doubtful whether a tenant for life, being a trustee, can properly spend capital money on works which a tenant is contractually liable to carry out. The distinction between landlord's and tenant's repairs, which is important to the law of agricultural holdings, is certainly quite nonsensical as applied to settled land. Nevertheless it may be regretted that of two possible interpretations the court has preferred the one which widens rather than narrows the breach through which the tenant for life may now draw on the trust capital for his personal benefit. It would be no more nonsensical to hold that only landlord's repairs were legitimated for charging to capital, and this would, it is submitted, be a rather more natural reading of

the two Acts in combination. One can only conclude that the court is disposed to favour this side-wind revolution, and this serves to emphasise how old-fashioned the whole subject of settled land has become. For while the Lord Chancellor was erecting elaborate machinery for the administration of settled estates, the Chancellor of the Exchequer was preparing their destruction. Is there any virtue now in preserving the capital of an estate for the benefit of the Treasury at the tenant for life's death? Why not, if a draftsman's error gives the opportunity, let the tenant for life enjoy some of the capital to supplement the income which is taxed almost to extinction? Sufficient unto the day is the lot of the remaindermen, and they may be only small losers compared with the Exchequer. At any rate, without imputing any of these motives to the court, one may contrast the present result with the decisions of earlier generations of judges who were determined to uphold the main principles of the Settled Land legislation even where this meant reading restrictions into the unqualified language of the Act: see for example *Re Leveson-Gower's Settled Estates* [1905] 2 Ch. 95, another case on employment of capital money. Against the present tendency there is at least this to be said, that if the foundations of the Settled Land Act are to be undermined by fortuitous and haphazard provisions, the law will become capricious and unreasonable in the long run unless it is amended.

One may wonder whether a tenant for life may now have the best of two worlds, by throwing the cost of repairs onto capital and yet claiming an income tax allowance for them by way of the usual maintenance claim as if he had paid for them out of income. Perhaps he may, for an owner of "unsettled" land can spend capital on repairs, if he likes, and the ultimate source of the money presumably does not concern the Inland Reveue. But perhaps he may not, for in the case of settled land, capital and income must be kept separate, whereas an absolute owner is at liberty to mix them, and use both to his own advantage as best he can. If there are the makings of a puzzle here, we may hope for an illuminating judgment upon it before long.

H. W. R. Wade.

LEASE—COVENANT—IMPLIED TERM—RIGHT OF THIRD PARTY TO SUE

Drive Yourself Hire Co. (London) Ltd. v. *Strutt* [1953] 3 W.L.R. 1111, is one of those cases where the Court of Appeal unanimously disposes of quite a straightforward issue, when suddenly there begins, like a cadenza from some brilliant virtuoso, a discourse

by Denning L.J., in which the historical, social and logical justifications of some important rule of law are examined, found wanting, and declared to be changed. These passages, if it may be said with the greatest respect, are always a pleasure to read, for the lucidity and power of the exposition are superb. Nevertheless they inflict not a little of that ultimate discomfort which fell upon Dr. Pangloss, when in addition to his other misfortunes he was finally compelled to change his opinions. This medicine is, of course, administered by all courts of law to a greater or less extent. It is the size and frequency of the doses, and the attractive colouring matter which is added to them, which make the law reports such sensational reading in these days.

The subject selected for overhaul in this particular case was the right of a third party to sue on a contract and the interpretation of section 56 of the Law of Property Act, 1925. The facts involved a landlord, tenant and subtenant of a rent restricted flat, and concerned the efforts of an assignee of the landlord to enforce a covenant in the sublease. The subtenant had covenanted with the tenant (but not with the landlord) not to assign the sublease without the consent both of the tenant and of the landlord. The tenant had also covenanted in his own lease, *i.e.*, with the landlord, not to assign or sublet without the landlord's consent, but the landlord had consented to the sublease on condition that it should contain the above-mentioned covenant. The disputed transaction was an assignment of the sublease which was made with the consent of the tenant but not with the consent of the landlord's assignees, and so contrary to the terms of the covenant in the sublease. The precise point was whether the premises had thus been "lawfully sublet" so as to entitle the assignee of the sublease to retain possession as against the landlord under the Rent Restriction Acts on the expiration of the term of the lease. Since it was held that the assignee of the sublease was within the statutory definition of a subtenant for this purpose, the remaining question was whether the transaction by which he became "subtenant" was lawful in every respect as against the landlord's assignees, the plaintiffs. The Court of Appeal, reversing the judgment of Lynskey J., held that the transaction was unlawful. The highest common factor of the three judgments, as expressed very clearly by Denning and Romer L.JJ., was that the unlawfulness arose not by breach of the subtenant's covenant but by breach of the tenant's covenant, for the tenant's covenant not to assign or sublet without consent implied also a covenant that, if consent was given to the creation of a sublease on condition that the subtenant should be required to covenant likewise, the tenant would not authorise any

disposition of the sublease without again seeking the consent of the landlord. It was therefore a breach of this implied covenant for the tenant to consent to the assignment of the sublease, and that assignment was therefore unlawful as against the landlord. The reasoning of Somervell L.J. is not quite so easy to follow, for although he agreed as to the implied term he spoke as if the unlawfulness arose from a breach of the subtenant's covenant rather than from a breach of the implied term. Nonetheless his conclusion appeared to be that the situation, taken as a whole, was not a "lawful" one within the meaning of the Act, so that he did not purport to be introducing any new legal doctrine. If one may say so without impertinence, the implication of the term which all three members of the court favoured was eminently reasonable, and disposed of the case very satisfactorily. If that were all, it would hardly require special notice.

Denning L.J., however, asked himself what would be the position if no such term could be implied. He then set out by a *tour de force* to show that the landlord and his successors in title had a right of action against the subtenant for breach of the subtenant's covenant with the tenant, and that the obstacle to third parties suing on contracts made for their benefit had been removed by section 56 of the Law of Property Act, 1925, in all cases where the obligation concerned property. He also attacked the doctrine that third parties cannot sue on contracts generally, and gave a learned and stimulating account of the subject from 1677 onwards; but he did not contend that a general *jus quaesitum tertio* could now be introduced judicially, since the House of Lords in 1916 had adopted a rule which was not, in the learned Lord Justice's view, "in accord with the needs of a civilised society." But that rule, he contended, was now greatly modified by section 56 (1) of the Law of Property Act, 1925, which provides that "a person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument." This provision replaced section 5 of the Real Property Act, 1845, but in somewhat wider terms, for it added the words "or other property" and "or agreement." It is these words which are held by Denning L.J. to have revolutionised the law: "I can think of no words more apt to do away with the rule in *Tweddle* v. *Atkinson*, leaving the courts free, in cases respecting property, to go back to the old common law, whereby a third party can sue on a contract made expressly for his benefit." This opinion will surprise Chancery lawyers, for the meaning of section 56 has often been considered,

and it has always been held to be much less revolutionary than Denning L.J. now suggests. Indeed, his interpretation has been put forward by counsel on a number of occasions and uniformly rejected. For example, Crossman J. in *Re Foster* (1938) 159 L.T. 279, 282, said "I think Mr. Stone's contention really amounts to this, that an agreement by A with B to pay money to C gives C a right to sue on the contract. I think it must go as far as that, and I am not prepared to hold that section 56 has created such an enormous change in the law of contract as would be involved in that proposition." There are other authorities, in particular a valuable opinion of Simonds J., to the same effect. They cannot be quoted here, but they will be found collected and carefully reviewed in the judgment of Wynn-Parry J. in *Re Miller's Agreement* [1947] Ch. 615, where again it was held that a covenant by A with B to pay money (an annuity) to C was not enforceable by C under section 56. All the judges who had been faced with the section had agreed that it had a limited operation, and in particular, as Simonds J. had explained, it was intended to allow only those persons to sue to whom the deed purported to make a grant or with whom a covenant or agreement was purported to be made. It could not be taken as allowing an action on a covenant or agreement by any third party merely on the ground that its performance would benefit him. Its object was to abolish the strict rule of common law that no person could sue upon a deed made *inter partes*, unless he had himself executed it as a party. It was not otherwise intended to affect the law of contract.

No one can say that section 56 is an easy section to interpret, but its general object is, perhaps, not impossible to divine. It was aimed at emancipating transfers of interests in property (in the version of 1845, real property), from the common law rule about deeds above mentioned. It has to be remembered that it was the Real Property Act, 1845, s. 2, which first introduced the rule that land could be conveyed by deed of grant, and section 5, ancestor of the present section 56, was in some degree a consequential provision. In the first place it made it unnecessary for a grantee to execute the grant. Then, just as it was made possible for A to convey land to B without B's participation, so it was made possible likewise to confer upon B the benefit of a condition, *i.e.*, a right of entry, or the benefit of a covenant. But presumably the section dealt only with covenants in so far as they created interests in land and were *ejusdem generis* with estates, interests and conditions—in other words, in so far as they were capable of running with land (and so the Court of Appeal has held both before and after 1925 : *Forster* v. *Elvet Colliery Co., Ltd.* [1908]

1 K.B. 629; *Grant* v. *Edmondson* [1931] 1 Ch. 1). But this last limitation seemed doubtful to Luxmoore J., in 1934 ([1936] Ch. at p. 438), and the last word perhaps remains to be said. But the present point is rather this : just as a person cannot take the benefit of a grant unless it declares that it is a grant *to* him, so surely he cannot take the benefit of a covenant or agreement unless it declares that it is made *with* him. If it does not so declare, it is not a covenant or agreement which purports to give him any rights at all. The object, and the only object, of section 56 and its predecessor is to remove the old impediment to actions by persons who are grantees, covenantees or promisees, but not parties to the deed. Its object is not to turn persons into grantees, covenantees or promisees if no grant, covenant or promise is made to them. So at least these sections have been interpreted over and over again, from the time of Jessel M.R. to the present. We are surely entitled to say, with the greatest of deference, that this long line of distinguished Chancery judges knew what they were talking about.

Denning L.J., however, claimed the support of the recent decision of Danckwerts J. in *Stromdale & Ball Ltd.* v. *Burden* [1952] Ch. 223. It is true that the covenant there enforced was not in so many words made " with " the plaintiffs, but it was a covenant that on demand by the plaintiffs the defendant would assign her leasehold interest to the plaintiffs. As a matter of construction Danckwerts J. held (at p. 234) that this covenant purported to be made with the plaintiffs and to confer an interest upon them. He expressly stated that he was following the earlier authorities, and it must be taken that in his opinion the form of the covenant fell just on the right side of the line. That is a different thing from Denning L.J.'s proposition that " A covenant is, for this purpose, sufficiently made ' with ' a person if it is, on the face of it, made directly for his benefit in such circumstances that it was intended to be enforceable by him." How differently this test would operate may be illustrated by the case in hand : a covenant made by A with B declaring that A will not assign a lease without the consent of B and C. An action by C against A would surely fall on the wrong side of the line under the law as hitherto understood, for C is no kind of covenantee.

A final objection to the argument that the minor amendments of 1925 were intended to introduce the *jus quaesitum tertio* into the law of contract is that the limitation of the section to " cases respecting property " would then be arbitrary.

H. W. R. Wade.

LEASE—WEEKLY TENANCY—LIABILITY FOR REPAIR

In so well tilled a field as that of landlord and tenant it is remarkable to find an important point of common law undecided. But so it was when *Warren* v. *Keen* [1954] 1 Q.B. 15 came before the Court of Appeal and presented the question whether a weekly tenant was liable for repairs in the absence of express agreement. The landlord had been required by the local authority to repair walls, windows, etc., for the purpose of keeping out damp, on the ground that the premises were unfit for habitation by reason of their not being wind and water tight. After doing the repairs she sued the tenant for the cost of them, successfully before the county court judge, but unsuccessfully in the Court of Appeal. The tenant held under a weekly tenancy which contained no covenant or provision about repairs, and the Court of Appeal held that his only duty was to use the premises "in a husbandlike or tenantlike manner." That meant, as Denning L.J. put it, that "the tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste . . . . But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by him, then the tenant is not liable to repair it." Somervell L.J. also said: "It seems to me that it would be absurd to suggest that a weekly tenant was under an obligation to repair. It is difficult to think of repairs which would not in themselves cost more than the weekly rent in many cases and yet it is suggested that he is impliedly liable to expend that money although his right to the premises may be terminated in a week's time." Even though the Rent Restriction Acts make the truth of these last words largely theoretical, it is plainly right to disregard them in ascertaining the position at common law.

Such was the dearth of authority that the court was unable to find any case where any periodic tenant, whether yearly or weekly, had been held liable on an implied obligation to repair, or (which is another way of putting the same thing) for permissive waste. There were dicta to the effect that a yearly tenant was required to keep buildings "wind and water tight," whatever that might mean; but even if that were the rule, which the court thought was doubtful, it was subject to an exception for fair wear and tear, which reduced it to nothing more than the undoubted duty not to commit

voluntary waste. Nor was the court ready to hold that the obligations of a yearly tenant, even if they could be ascertained, applied to a weekly tenant. The liability of a yearly tenant is therefore still an open question, strange though that may seem at this time of day; but the judgments in the present case point strongly towards the exoneration of a yearly tenant to the same extent as a weekly one. Denning L.J. indeed opened his judgment with a wide statement which is not in terms limited to any particular class of tenants at all: "Apart from express contract, a tenant owes no duty to the landlord to keep the premises in repair. The only duty of the tenant is to use the premises in a husbandlike, or what is the same thing, a tenantlike manner." If this is to be taken as implying that tenants for years are not liable for permissive waste, a view for which there is much to be said, it conflicts with a dogmatic statement by Parke B. in *Yellowly* v. *Gower* (1855) 24 L.J.Ex. 289. This point, which was not before the court, is also perhaps to be regarded as open. That the repairing liabilities of all classes of leasehold tenants, except now weekly tenants, should still be unsettled is a fact not very creditable to the common law; but it implies a compliment to the profession for the care with which leases are drawn, since a lease without an express repairing clause is evidently a great rarity.

H. W. R. Wade.

HUSBAND AND WIFE—DESERTED WIFE'S RIGHT TO MATRIMONIAL HOME

When desertion is frequent and houses are short it is not surprising that the courts should have felt the need for new rules for protecting a deserted wife's possession of the matrimonial home. What is surprising, perhaps, is the broad footing upon which the Court of Appeal has sought to establish her rights, by a radical reconstruction of the law relating to licences and interests in land. But this is no place to launch into the sea of potential troubles flowing from *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, which have been so well surveyed by Mr. R. E. Megarry in 68 L.Q.R. 379. All that will be noted here is that in *Lloyds Bank Ltd.* v. *O's Trustee* [1953] 1 W.L.R. 1460, Upjohn J. disposed of some of the more fanciful of the many new propositions which can be argued in the present unsettled state of the law. The facts were very simple: first came the marriage; then, some years later, the husband mortgaged the matrimonial flat to the plaintiffs in order to secure his overdraft; after a few more years the husband deserted the wife, went

bankrupt, and the mortgagees claimed possession from the wife. The wife asserted a right, as against the mortgagees, to remain in the flat so long as it continued to be the matrimonial home. But Upjohn J. had no difficulty in upholding the mortgagees' claim to possession.

The short ground of decision was that, whatever special rights a deserted wife may have, they do not arise until the time of desertion, and therefore interests created prior to the desertion are paramount. None of the authorities cited by counsel for the wife supported the proposition which he put forward, that the wife had something in the nature of an irrevocable licence from the moment of entering into the matrimonial home. Even the judgment of Denning L.J. in *Bendall* v. *McWhirter*, the high-water mark as yet of the doctrine that a deserted wife has an interest binding on third parties, went only to the point of relying on "the status of marriage, coupled with the fact of separation owing to the husband's misconduct." The special interest cannot, therefore, arise before the desertion, and when it does arise it is like other interests subject to prior incumbrances. The decision is therefore welcome as being in accordance with principle, and as ruling out the extravagant suggestion that a normal and successful marriage is a blot on the title to the matrimonial home. Had that been right there would have been resurrected something very like the wife's potential right to dower at common law, which was such a bane in conveyancing until it was abolished by the Dower Act, 1833.

How far a deserted wife can enforce her rights against successors in title who come in only after the desertion is another matter altogether, and a very uncertain one—as may be seen by comparing the judgment of Denning L.J. above referred to with the remarks of Jenkins L.J. in *Bradley-Hole* v. *Cusen* [1953] 1 Q.B., at p. 306. In this exciting situation it cannot be long before some litigant will try his, or more probably her, luck.

H. W. R. Wade.

Finding—Money Hidden in the Matrimonial Home—Presumption of Ownership

Since the decision in *Hannah* v. *Peel* [1945] K.B. 509; 61 T.L.R 502, was added to the trilogy of cases made famous by Dr. Goodhart in his *Three Cases on Possession* the law of finding has suffered from a considerable degree of uncertainty. It seems hardly desirable, therefore, that the rules applicable to finding should

be extended into wholly fresh fields in the absence of some compelling reason. It is respectfully submitted that in *Re Cohen, National Provincial Bank Ltd.* v. *Katz and Others* [1953] 1 Ch. 88; [1953] 1 All E.R. 378, the law of finding has been so extended without any such reason and with unpredictable consequences.

Mr. and Mrs. Cohen lived in a freehold flat owned by the wife. The husband died in April, 1948, having appointed his wife and the plaintiff bank to be his executors. The wife died in the following August, the plaintiff bank being also her executor. After the death of the wife the bank's agent discovered banknotes and coins worth nearly £6,000 concealed in various hiding places in the flat, *e.g.*, behind a water-tank on the landing, under a kitchen cabinet, in a trunk, in a locked box behind a wardrobe and wrapped in cloth inside the radiogram. There was affidavit evidence that the husband had over a number of years withdrawn many thousands of pounds from his business and that the wife had, about a year before her death, withdrawn some £1,500 from a deposit account at a bank; otherwise there was no evidence whatever as to when, why, or by whom the money had been concealed.

Faced with the difficult question whether the money belonged wholly to the estate of the husband or to that of the wife, or partly to the one and partly to the other, Vaisey J. held that it belonged wholly to the wife's estate on the ground that there was a legal presumption, established by a consistent line of cases, that the owner of land is the owner of chattels found on the land, a proposition for which he cited *South Staffordshire Water Co.* v. *Sharman* [1896] 2 Q.B. 44. Thus, as the wife, who owned the flat, survived the husband, her estate was wholly entitled. On a subsidiary ground the learned judge reached the same conclusion. Refusing to apply the principle, established by himself in *Jones* v. *Maynard* [1951] Ch. 572, and approved by the Court of Appeal in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63, that where the purposes for which a husband and wife establish a "joint purse" come to an end the sum therein remaining should be divided equally between them, he drew the inference in the present case that the hoard or "nest-egg" had probably been held by the spouses as joint tenants, with the intention that if they did not sever that tenancy during their joint lives then the whole hoard should belong to the survivor of them.

It may be doubted whether the authorities justify the view that there is "a consistent line of cases which show that there is a legal presumption that the owner of land is the owner of chattels found on the land." The only way of reconciling the decisions in *Bridges* v. *Hawkesworth* (1851) 15 Jur. 1079 and *Hannah* v. *Peel* (*supra*), with those in *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch.D.

562, and *Sharman's* case (*supra*), appears to be by making the artificial distinction that, whereas the landowner will have a better right than the finder to retain chattels found buried in or attached to his land, this is not necessarily the case with respect to chattels found lying loose in a house or on the land itself, where the finder may indeed have the better claim. *Hannah's* case has been explained (61 L.Q.R. 333) on the ground that there the landowner had never been in occupation of his premises, which implies that the possession which the law attributes, even before entry, to a person who has taken a conveyance or a lease of land (see sections 51 (1) and 149 (2) of the Law of Property Act, 1925) does not suffice for this purpose; but that is to ignore that in *Bridges'* case the shopkeeper *was* in occupation of the premises where the banknotes were found and that in *Hannah's* case Birkett J. deliberately followed the decision in *Bridges'* case.

A more important question, however, is whether the law of finding has any relevance at all in such a case as *Re Cohen*, where the banknotes were not "lost" in the ordinary sense of the word, since they were deliberately hidden (*cf.* the Ontario case of *Bird* v. *Fort Frances* [1949] 2 D.L.R. 791, at p. 798, *per* McRuer C.J.H.C.). It was accepted that the money must have been concealed by the husband and wife (or by one of them), probably during their joint lives, and that they were originally, therefore, the only possible claimants to ownership. After the husband's death possession was no doubt in the wife, but the presumption of ownership arising therefrom in her favour would have been rebutted, or rendered inapplicable, by the evidence which she could have given as to who had deposited the notes and for what purpose. Thus it was only after the death of the survivor, the wife, that evidence of ownership ceased to be available and only then could any question of "finding" arise. By that time the freehold title to the flat had already vested in the bank as her executor, though, as in *Hannah's* case, the executor did not actually occupy the flat. The "finder" was thus the executor of both possible claimants and simultaneously the owner of the freehold premises where the chattels were discovered. In which of these capacities did the bank "find," and therefore acquire possession of, the notes? It can only be replied "In all those capacities," and there is then no basis for applying rules which have been developed to settle the rival claims of a person whose sole right depends on his physical possession of the thing found and of a person who owned, possessed or occupied the land where, unknown to him, that thing lay unnoticed.

Although facts such as those in *Re Cohen* may not occur frequently similar difficulties may arise whenever there is little

or no interval between the deaths of a husband and wife who live together. Their respective representatives may be faced with the difficulty of deciding the ownership of sundry chattels in the matrimonial home which cannot be clearly identified as having belonged to one spouse rather than the other. If each appoints a different executor, will this precipitate an unseemly scramble between the latter to be the first to "find" the articles concerned and so to acquire the advantages of physical possession, assuming that *Hannah's* case may in appropriate circumstances oust the rule in *Sharman's* case? If the spouse in whom the freehold was vested dies first, will the executor of that spouse, as the new freeholder, acquire title to the chattels by virtue of the rule in *Sharman's* case, or will the fact that the surviving spouse remained in occupation of the matrimonial home until death confer a better right on his executor? In the event of simultaneous death in some common accident, must the rule as to *commorientes* be applied to establish the identity of the last possessor, or will title simply be attributed to the estate of the former freeholder? If the matrimonial home was vested in the spouses jointly as trustees for sale, will the answer depend upon whether their rights in equity to the proceeds of sale were joint or in common, or will ownership be attributed to the estate of the survivor on the ground that the legal title to the house vested in that one by survivorship, regardless of their position in equity?

These may seem hypothetical questions, but it is submitted that it is artificial and repugnant to apply the uncertain rules of finding to the wholly different field of disputes between the estates of persons who had lived together in the same household. It seems preferable that the judge should base his decision upon whatever inference he is able to draw as to the probable intentions of the parties or as to the former ownership, but that if no inference is possible he should adopt the principle of equal division established in *Jones* v. *Maynard*. It is respectfully suggested that in the present case Vaisey J.'s "nest-egg" principle was an eminently reasonable inference and much to be preferred to the primary ground on which he based his decision.

J. Thornley.

WILL—CONDITION—CERTAINTY—"MEMBERSHIP" AND "DOCTRINE" OF THE CHURCH OF ENGLAND

The case of *Re Allen decd. Faith* v. *Allen* [1953] Ch. 116, 810 (C.A.), is of interest mainly because it illustrates once again the

difficulties of defining membership of the Church of England and of recognising with precision the limits within which that Church's doctrines may be found.

The testator devised realty to the eldest of the sons of F " who shall be a member of the Church of England and an adherent to the doctrine of that Church " with the proviso that, if there should be no son of F " who shall be a member of the Church of England or an adherent to the doctrines [*sic*] of that Church," the property should go elsewhere.

Vaisey J. held that the devise was void for uncertainty. The Court of Appeal (Sir Raymond Evershed M.R. and Birkett L.J., Romer L.J. dissenting) held that it was valid.

Both courts appear to have taken the view that they were not here dealing with a condition subsequent, but rather with a qualification. If they had been dealing with a condition subsequent, it appears that they would have held the language to be too uncertain, for " the courts have always insisted that conditions of defeasance, in order to be valid, should be so framed that the persons affected . . . can from the outset know with certainty the exact event upon the happening of which their interests are to be divested " (*per* Lord Russell of Killowen in *Clayton* v. *Ramsden* [1943] A.C. 320, at p. 326). But, whereas Vaisey J. held that the words were too uncertain even for the purpose of a qualification, the Court of Appeal by a majority held that for this purpose they sufficed, all the members of that court holding that membership of the Church of England could be sufficiently recognised, though Romer L.J. agreed with Vaisey J. that detection of a test for adherence to its doctrine or doctrines presented an insuperable difficulty.

" ' Is this man a member of the Church of England? ' would seem to me a question which could be answered quite simply, ' Yes ' or ' No ',' " said Birkett L.J. (at p. 822), and continued, " Similarly, if the question were asked : ' Is this man an adherent to the doctrine of the Church of England? ' I should have thought that it would be possible to answer the question with equal ease." The fact that the Court of Appeal (with great difficulty) was in this case able to envisage an answer to both questions and thus save the will is, perhaps, a tribute more to the broader (though belated) attitude which the courts now tend to adopt in interpreting the lay testator's language rather than to the extent of the court's knowledge of ecclesiastical matters. Indeed, it may well be that the Court of Appeal was able to reach a more satisfactory result on the merits of the case by reason of the fact that it was in this respect manifestly less encumbered by knowledge than was Vaisey J.

to whose learning in ecclesiastical law just tribute was paid by the Court of Appeal.

In *Re Perry Almshouses* (1898) 1 Ch. 391, at p. 400, Stirling J. said: "Whatever difficulty there may be in giving a strict legal definition of what constitutes membership of the Church of England, I think that a person who has been baptised, has been confirmed, or is ready and desirous to be confirmed, and is an actual communicant, does hold the status of a member of that church, and would be ordinarily regarded and spoken of as such." Although that statement is probably right so far as it goes, difficulties soon appear, and Vaisey J. cited several examples of persons whose status is ambiguous and it is not difficult to think of further instances. What, for example, are we to say of the unconfirmed, but baptised, adult, who never goes to church, but who has never joined any other religious denomination? If he chooses to declare himself a member of the Church of England, he certainly qualifies for a vote under the Representation of the Laity Measure, 1929, and without any such declaration he has rights of burial and marriage. Cripps on *Church and Clergy*, 10th ed., at p. 4 says, "The ultimate test of membership of the Church of England can only be a question of conscience." Conscience, however, is apt to prove elastic when the tug of self-interest is strong, and it is understandable that the courts should be slow to apply a test which, in the ultimate resort, places the decision in the hands of the potential devisee.

Nor was the task simplified by the addition of the words "and an adherent to the doctrine of that Church." It is difficult to see what, as an addition to membership, those words can mean, and Romer L.J. found it as impossible to give a meaning to them as the majority of the House of Lords found when called upon to decide in *Clayton* v. *Ramsden* [1943] A.C. 320, what was meant by being "of the Jewish faith." It is probably harder to know when a person is an "adherent" than it is to recognise doctrine. Yet, to find in those words an insuperable difficulty, while understandable if they are considered in isolation, seems a little odd if one has already swallowed the camel of membership of the Church of England. A theologian would be hard put to it, if called upon, to give an exhaustive catalogue of the Church's doctrines; but the simplest soul can say, "All that Holy Church teaches I hold." Whether or not he is truthful in so saying is another matter; but this (to apply Cripps to the new context) "can only be a question of conscience." No doubt because the word "and" rather than "or" was used, making both membership and adherence the double test, neither court had occasion to note that it is possible

to adhere fully to the doctrines of the Church of England without being a member of that Church. Such must be the condition of many devout members of the Scottish Episcopal Church and of other Churches within the pan-Anglican Communion.

It is submitted that, although the testator's choice of words was not happy, the class of persons he was seeking to define is sufficiently certain. The major difficulty does not arise until one seeks to determine whether any given person falls within the category. If, for example, the potential beneficiary were the Archbishop of Canterbury, the task would be easy. But if he were a baptised, but uninstructed, child of six, or an unbaptised national serviceman who had allowed himself to be entered as "C. of E.," the task would be difficult in the extreme. Possibly (to vary Cripps) the ultimate test can only be a question of evidence. In the case under consideration the problem is probably limited to a narrow one of construction and the decision does no more than determine what this particular testator must be taken to have meant by the language he used; but it opens a wide vista of speculation and it is unlikely that the last word has yet been said.

E. Garth Moore.

PROFESSOR SIR PERCY WINFIELD, Q.C., LL.D., F.B.A. (1878–1953)

I: By Sir Arnold McNair

My justification for accepting an invitation to write some pages in this *Journal* on the life and work of Percy Winfield is our friendship and our close association in the Cambridge Law School during almost the whole of his career. I do not feel competent to appraise his contributions to the law, and I am glad that I have succeeded in persuading Mr. P. A. Landon, Fellow of Trinity College, Oxford, to undertake this task.

As an undergraduate I was aware that Winfield had a first-rate coaching practice (carried on in association with David Oliver), but I never met him. When I returned to Cambridge in 1913, he and Lady Winfield were my first friends outside my own college, and time only made the friendship closer. At that time, in spite of supervision for several colleges and private coaching, he was already deeply committed to research. Within a few days after the end of each term, he would be found at work in the old Squire Law Library (opened in 1904 on the Downing site, and now the Marshall Library of the economists), often the sole occupant other than the bearded lay Librarian, Austin Johnson. Winfield was then engaged on the work published in 1921 in two volumes under the titles of *History of Conspiracy and Abuse of Legal Procedure* and *Present Law of Abuse of Legal Procedure*. It was in the course of this work that he laid the foundation of his knowledge of the *Year Books* and of medieval literature. This knowledge enabled him to do justice to the most difficult part of his *Chief Sources of English Legal History*. Winfield's early devotion to research was one of the causes of his success as a teacher. He found in research refreshment after a heavy term's teaching, with the result that there was always an intake of new material and new experience to balance the continual output of lectures which, in the nature of things, must follow traditional lines. However busy he became in his busy life, there was always in the background a piece of private work—a book, an article, or a piece of research—to which he could turn and in which he could find a change. He was a prodigious worker and I am confident that there is no man, alive or dead, who has lived so much as Winfield in the Squire Law Library, old and new. His presence there involved incidentally constant accessibility to

colleagues and students and constant opportunities of being useful to them.

But I am anticipating. When the First World War broke out in 1914, Winfield, though already 36, took a commission in the Cambridgeshire Regiment and after many dreary months of waiting went to France. He was severely wounded in action near Morlancourt in August, 1918, and was discharged in 1919 after being attached to the Staff at the War Office.

At the time of his demobilisation he was, not unnaturally, depressed about his prospects, for he was over 40 and had received little official encouragement. He was, indeed, seriously considering other opportunities which had presented themselves, both in the Civil Service and in other Universities. Friends, however, persuaded him that the future of law teachers in Cambridge would be brighter than its past had been, and that if he could tide over immediate problems a secure position lay ahead of him. We all know how abundantly events justified this persuasion. His own college, St. John's, appointed him to a lectureship under the inter-collegiate system which existed before the creation of University Faculties by the Statutes enacted by the Commissioners of 1923. He was further greatly encouraged by Trinity College which made a lectureship for him tenable concurrently with the St. John's post. He found himself very popular in Trinity and in the later days of his prosperity he testified to his gratitude to the College by a gift for the use of the High Table. Undoubtedly after his own college, to which he was devoted, Trinity came first in his affections.

In 1921 the publication of the two books above mentioned in relation to that year placed him at one bound in the forefront of legal scholars, and ensured his election to the Law Fellowship of St. John's College which had been vacant since the death of Bushe-Fox. In 1926, when the new University Statutes came into force, the inter-collegiate system of lectureships came to an end, and Winfield became a University Lecturer. Three years later he was elected, with general acclamation, as the first holder of the Chair of English Law endowed by the will of W. W. Rouse Ball.

During all the active years of his career Winfield's main interest and the focus of his powers was the Cambridge Law School. His reputation as a scholar was steadily rising; but he was singularly unselfish, and I am sure that his main preoccupation was his desire to give the students what in his judgment they needed to make them good lawyers and useful members of their profession. His range was wide, as often results from the system of college supervision. There were few branches of law in which he had never worked, but I do not think that he was ever what Buckland used to describe

as an " addict to Jurisprudence," beyond being responsible for at least one edition of Wise's *Outlines of Jurisprudence*. He edited Lawrence's *Principles of International Law*. He was one of the editors of Maitland's *Selected Legal Essays*. He was editor-in-chief of the *Cambridge Law Journal* from 1927–1947, a fact which involved close contact with the student writers of the notes on cases and was very beneficial to them. He edited the *Law Quarterly Review* in 1929 during the absence of the editor abroad.

After becoming Professor he confined himself more and more to the law of torts. To the end his lectures were prepared with as much care as would be expected of a keen young lecturer delivering his first course of lectures. They were supplemented with a detailed syllabus and sometimes with diagrams, and no effort was spared in clarity of expression or in care of articulation to enable every student who listened to carry away a true picture. His insistence on the importance of the decisions, and the direct method of studying them and using them, taught many members of his audience a lesson of permanent value in practice. There is little doubt that the members of the Law School, both senior and junior, placed him first among its teachers.

But his qualities were highly appreciated far beyond the Law School. His character and judgment were greatly valued in his College and in the University at large; his opinions were listened to with deep respect on the Council of the Senate, of which he was a member for eight years, and on the Bench of the Borough (as Cambridge then was) during his long service as a Justice of the Peace. He was visiting Professor at the Harvard Law School in 1923, where he gave the lectures afterwards published under the title *The Chief Sources of English Legal History*, and in 1930 he was Tagore Professor at the University of Calcutta where he delivered the course published under the title *The Province of the Law of Tort*.

Among the public services rendered by him were his membership of two Lord Chancellor's Committees, that on Law Revision and that on Law Reporting. He also was at one time Deputy County Court Judge, Circuit No. 35. Among his distinctions were that of King's Counsel (1943); the Fellowship of the British Academy; an honorary Benchership of the Inner Temple; and honorary doctorates of the Universities of Harvard, Leeds and London.

His principal recreation was his interest in games. In his youth he had played lawn tennis for the county, and he became Captain of the Cambridge County Lawn Tennis Association. From 1940 onwards he was President of the University Rugby Football Club.

One of his characteristics was lack of interest in himself. I can

only remember one occasion on which I ever heard him talk about himself or his work—when he emitted a mild grumble because a friend, a prolific writer, had published an article which made it clear that he had not troubled to read an important piece of work published by Winfield. His sense of duty, both public and private, was very strong. He was perhaps a little indiscriminating in the public work that he would undertake and was not good at saying "No." He had a strong sense of obligation in social matters, which Lady Winfield entirely shared. Their house was always full of friends and acquaintances, young and old, particularly his pupils, and he continually entertained in College. When his mind was failing some of his characteristics survived by instinct—his ready offers of hospitality, his kindly interest in the personal affairs of the person to whom he was talking, his courtesy and his lack of interest in himself.

Lady Winfield survived him for only six months. Only those who knew them both well can realise the degree of their mutual devotion and the very large contribution that she made to the happiness and success of his life. When he was knighted in 1949 he told a friend that what gave him most pleasure was that the honour would be shared by her.

II: By P. A. Landon

Although Winfield's first published works covered other spheres (including Legal History, Jurisprudence and International Law), his real interest lay in the English common law, that is to say, in the law of Contracts and Torts, and in the last twenty-five years of his life he concentrated himself almost entirely upon these two subjects. His originality of outlook and his erudition were clearly shown in two important articles in Vol. 42 (1926) of the *Law Quarterly Review* on "The Myth of Absolute Liability" and "The History of Negligence in the Law of Torts"; these are still constantly referred to by students of the law of Torts. And the law of Torts was the subject which he chose for his professorial lectures, of which he printed and supplied to members of his audience a full and valuable syllabus, sixty-six pages in length, which may be regarded as a prolegomenon to his *Textbook*. Just before he became Professor, he undertook to revise and complete Sir John Salmond's unfinished treatise on *Contracts*: this was published in 1927 under the title Salmond and Winfield. Two of the chapters, on Capacity and on Judicial Remedies, came from Winfield's own pen. More important, and certainly more provocative, was his next publication, in 1931, of his Tagore Lectures on the *Province of the Law of Tort*, a wholly original conception, which perhaps gave (as he

himself admitted in the Preface) disproportionate space to the so-called Quasi-Contract, a term which, in his own words (Salmond and Winfield, p. 488) was at that time " unfamiliar to English law " and which he did much to popularise. Some of Winfield's greatest admirers thought that the *Province* would have been a better book if he had reconsidered certain of the more contentious questions which it raised, and it was criticised by an anonymous reviewer in the *Times Literary Supplement* for June 25, 1931, in language which led Winfield to expostulate in the next number of the *Supplement*. The *Province* also gave rise to an amusing and light-hearted controversy in which Winfield, Dr. Stallybrass and I all participated: this to be found in the pages of the *Bell Yard* for 1931 and 1932.

Six years later, in 1937, Winfield published his *Textbook of the Law of Tort*. His high reputation as a writer and as a teacher ensured an immediate welcome for this entirely new presentation of the subject; it at once achieved a wide circulation, and its popularity is shown by the fact that no fewer than five editions had been issued by 1950. It is his most important contribution to legal literature, and his qualities as a lawyer and exponent can best be judged by its contents. His lively and sometimes homely style makes the work most readable. And he succeeded in steering a middle course between Sir John Salmond's treatment on the one hand, which, in spite of Dr. Stallybrass's changes, remained over-weighted by its juristic basis, and Sir Frederick Pollock's famous treatise on the other, which never quite shook off the fetters of the mid-Victorian era. Winfield, on his part, always loyally accepted the decisions of the House of Lords; but, where there was still room for speculation, he never hesitated to express his own critical opinions. He saw clearly that the difficulties in the law are (in his own language) due to " an inevitable lack of precision in defining rights and duties," not to " an avoidable lack of precision in using words." This essentially common-sense outlook is the chief factor that has made Winfield's work, both in the *Textbook* and elsewhere, of such value to the present generation.

In 1942 he undertook the task of editing the 11th edition of Pollock on *Contracts*, and, realising that his readers would wish to have before them Pollock's *ipsissima verba*, he repeated, without alteration (save where the law had become out of date), the language of the last edition that Pollock himself had produced, adding copious illuminating footnotes and one new chapter on Damages, a topic which for some unknown reason Pollock had omitted. Two more editions of this work were called for before Winfield's death.

It would be a mistake to think that Winfield's influence on different branches of the law was confined to the academic sphere. Many members of the Judiciary, including more than one of the Law Lords, would readily have acknowledged the great assistance which they received, in personal contact with Winfield, in deciding upon the facts of a particular case. In giving this advice, he was always scrupulously fair to those writers whose views differed from his own. This was in keeping with his innate courtesy, which won him so many friends and which is mentioned elsewhere in this memoir. The reforming zeal that is natural to Cambridge men was always tempered, in Winfield's case, by genuine respect for the conservatism of other Universities.

All teachers of law throughout the country were brothers to him, and the present solidarity and prestige of the academic side of the profession owe much to his constant encouragement of younger men and to his support of the Society of Public Teachers of Law, of which he was President in 1929–30 and which conferred upon him, on his retirement, the high distinction of honorary membership.

FURTUM AND LARCENY

P. W. Duff

Anyone who studies side by side the Roman law of *furtum* and the English law of larceny must be struck by the fact that, whereas Roman thieves and English thieves behave much alike, Roman lawyers in discussing theft usually assume that a civil action is being brought, for money damages, but English lawyers are mainly concerned with criminal prosecution, leading to a fine, or imprisonment, or, in former times, to the gallows.

Why?

Professor Jolowicz, in his well-known edition of Digest XLVII. 2, *De Furtis* (1940), says (p. xii): "In the later Republic and the Empire . . . there were criminal as well as civil courts, and it is at first sight surprising that the legal literature on the subject of theft should treat the matter almost exclusively from the point of view of civil liability. Though the facts of larceny will commonly amount to the tort of conversion, thieves are not as a rule worth suing in a civil court, so that we think of theft primarily as a crime which needs to be punished in the interests of the community, and one would have imagined that the same consideration applied in the highly civilized society of the Roman Empire. The solution of the difficulty is uncertain." He points out, with a wealth of references, that criminal prosecution was possible, and adds: "The only real difficulty is in fact to know what was the usual procedure in classical times." But is that the only real difficulty? Is it not also a real difficulty to know why the classical jurists, and consequently Justinian, say so much about civil liability for theft?

The purpose of the present note is to suggest, very tentatively, that one reason may be the existence of slavery.

Every law student knows that, if a slave stole, the victim could bring *actio furti* against his owner, who must either hand over the slave in what is called noxal surrender or pay penal damages, twofold or fourfold the value of the stolen property.

Free thieves were no doubt usually poor, at Rome as in England; but Roman thieves must very often have been slaves, and a thieving slave might well have a rich master, quite able to pay the damages demanded.

Whether the master would pay damages or surrender the slave would normally depend on whether the damages were more or less than the slave's value. A thief would obviously be worth less (except to a Fagin) than an honest slave, but he could always be sold for something appreciable to work in an *ergastulum* or on a *latifundium*. Hence if a plaintiff could prove a small theft by a slave, he would usually get twofold damages; if he could prove a large theft, he would usually get surrender of the slave. In either case, it would be worth while to bring the *actio furti*.

With this idea in mind, some notorious texts are easier to understand. The present writer had long believed that the Roman rules about *furtum* as a delict must be regarded as a product of the study and the lecture-room, not of the courts, because thieves so seldom have any money; and that many thieves were punished criminally for one who paid the damages claimed in an *actio furti*. But it is now submitted that the appearance of fantasy, of unrealistic speculation, presented by the title *De Furtis*, is partly due to the fact that, where the thief was a slave and the damages would be large, the damages would never be paid, because the slave would be surrendered instead.

Two examples may suffice to illustrate the point.

A familiar chapter of Gaius (3.184) discusses the difference between *furtum manifestum* (with fourfold penalty) and *furtum nec manifestum* (with twofold). This would seem to be a basic question, sure to have been settled before the Empire; yet Gaius gives four views, two of which were held by respectable authorities in his day, while a third was adopted by Justinian. Can it be that all questions about *furtum manifestum* were unpractical because the master of a manifest thief would almost always surrender and not pay fourfold?

Nothing in the *De Furtis* is more academic than the discussion of theft from a heap (D. 47.2.21. pr. and 5).[1] He who touches a slave's ear touches (and, if dishonest, steals) the whole slave; he who takes a bushel of corn from a heap steals the whole heap; he who takes a pint of wine from a tanker steals all the wine in the hold. (So the text seems to have said originally, though little nuggets of common sense have been inserted in it, whether by Ulpian himself, by a Western post-classical annotator, by a professor of Beyrout, or by Tribonian.) This is surely more suitable for philosophers than for lawyers. Can it be that, when it appeared that the liability for such thefts might be large, and was hard to

[1] For an illuminating, but purely academic, discussion of this fragment, see Karl Olivecrona, *Three Essays in Roman Law*, Copenhagen, 1949, pp. 43–51.

define, masters handed over their slaves without more ado, leaving argument to those people who liked that sort of thing?

One more point. Population problems are always difficult, but it seems likely that there were fewer slaves in the third and sixth centuries than in the late Republic and early Empire. If so, thieves would less often be slaves, and it would less often be possible to bring *actio furti* against a defendant rich enough to be worth suing. May this be one reason why Ulpian says, and Justinian emphasises, that "at the present day *furtum* is generally made the subject of criminal proceedings"?

THE EFFECT OF STATUTORY NOTICE OF INCUMBRANCES

H. W. R. Wade

One merit of the traditional English system of conveyancing, which helps to excuse its many imperfections, is that it gives rise to so little litigation. This is not because all its principles are too clear for argument—there are indeed astonishingly few decisions on the absolute fundamentals of title—but, more probably, because negotiations between vendor and purchaser are so commonly handled under legal advice from before the stage of contract, and this is in practice the best (if not the cheapest) precaution against the kind of unpleasant surprise which may drive the parties into court. If we make an exception for the Statute of Frauds,[1] that inexhaustible fountain of lawsuits, we may say that the courts have but little to do with vendors and purchasers of freehold land, and that the courts have followed the practice of the profession quite as much as the profession has followed the decisions of the courts. Thus the thousands of daily transactions are handled in the least contentious manner possible. This is as it should be.

The connection between these generalities and the narrow problem to be discussed in this article is that the problem itself is one which ought to represent a major stumbling-block in every-day conveyancing, yet for twenty-five years blind eyes have been turned to it,[2] and it has produced no dispute which has reached the High Court. The question is whether a purchaser of land, under a contract which would normally allow him to insist on a perfectly clean title, is obliged to accept it subject to incumbrances merely because they are registered as land charges under the Land Charges Act, 1925. In fact there are two distinct questions here: first, whether the purchaser can object to registered incumbrances if the contract is open, *i.e.*, says nothing about the title to be shown; and secondly, whether he is in any better position if the contract says that the sale shall be "free from incumbrances," or uses other words to that effect. The stumbling-block is the

1 (1677) 29 Car. 2, c. 3, s. 4, now replaced (as regards dispositions of land) by the Law of Property Act, 1925, s. 40.

2 A striking example is offered by Williams, *Vendor and Purchaser*, 4th ed., 1936, which cites the case four times but ignores the point of difficulty altogether. In the passages on waiver (pp. 227–29, 241) to which the point is so important, the case is not mentioned.

decision of Eve J. in *Re Forsey and Hollebone's Contract*,[3] where he answered both questions in the negative, that is to say, adversely to the purchaser. Thus, in Eve J.'s opinion a person who agreed to buy a house "free from incumbrances" would be obliged to complete the purchase even though it turned out, on investigation of title, that it was subject to registered restrictive covenants or to registered contracts for lease or sale; and his right to rescind the contract, which is his standard remedy in such a case, would be lost. The position is hardly less surprising where the contract says nothing about the title, for the law has always allowed the purchaser to assume that the vendor can make out an unspotted title,[4] and a provision about freedom from incumbrances merely make express what is otherwise implied.[5] Therefore a purchaser who makes a contract without legal advice, for example, by a successful bid at an auction sale, is exposed to grave risks unless he is somehow able to search the register before contracting.

If this is right, the result must rank as perhaps the worst of the unintended by-products of the property legislation of 1925. For it can hardly be doubted that the framers of those Acts had no intention of obliging purchasers to accept defective titles or, as is the only alternative, to embark on an investigation of title before contract, as well as at the usual time between contract and conveyance.[6] The object, of course, was to assist the settled practice, not to disrupt it. That is why, for example, the Land Charges Act requires registration of a land charge "before the completion of the purchase"[7]; and similarly, the Law of Property (Amendment) Act, 1926, provides that an official certificate of search protects the purchaser "if the purchase is completed" within the next two days.[8] Obviously the assumption is, as any lawyer would suppose, that the time for the purchaser's search is immediately before completion, and that until then he can make his contract and his investigation of title in the accustomed way.

In *Re Forsey and Hollebone's Contract*[9] the sale was agreed to be "free from incumbrances except as hereinafter mentioned," and certain covenants were then specified. The investigation of title

[3] [1927] 2 Ch. 379.
[4] See *e.g.*, *Hughes* v. *Parker* (1841) 8 M. & W. 244; Williams, *Vendor and Purchaser*, 4th ed., p. 37.
[5] The question whether this right is "implied" or collateral is discussed below, p. 98.
[6] The foremost object of the Law of Property Act, 1925, was "to reduce to a minimum the requisite investigation and reinvestigation of title": Wolstenholme and Cherry, *Conveyancing Statutes*, 12th ed., p. 205.
[7] s. 13.
[8] s. 4 (2).
[9] [1927] 2 Ch. 379.

proceeded without incident until just before the date fixed for completion, but then the purchaser's solicitors, making the usual search in the Register of Local Land Charges, were informed that the land was subject to a local authority's resolution to make a planning scheme under the Town Planning Act, 1925. The resolution was duly registered some months before the contract was made, but neither party had heard of it. Thereupon the purchaser refused to complete, and asked for a declaration that a good title had not been shown. This was refused both by Eve J. and by the Court of Appeal [10] on a ground which is not material to this discussion, namely, that a mere resolution to make a planning scheme in the future, subject to Ministerial approval and various other contingencies, was a potentiality of so shadowy a kind that it could not be held to be a subsisting incumbrance. But the learned judge of first instance had gone on to the secondary ground of decision already mentioned, namely, that even if the resolution was an incumbrance the purchaser would be bound to accept it since it was registered before the date of the contract. As to this startling doctrine the Court of Appeal said not a word, and it therefore rests on Eve J.'s remarks alone. But these can hardly be dismissed as *obiter dicta*. They represent the learned judge's opinion on a point assumed by him to be material; and, indeed, the logic of them is so beguiling that several writers have treated them as incontrovertible even though they have thought the result so unsatisfactory as to require statutory amendment.[11]

The learned judge's argument was that the peremptory language of section 198 of the Law of Property Act, 1925 ("registration . . . shall be deemed to constitute actual notice . . . to all persons and for all purposes connected with the land affected") must be applied in combination with the well-known doctrine that a purchaser may not object to incumbrances which he knew, when he contracted, to be irremovable by the vendor. The principle of the latter doctrine is that a person who knows that some property has unalterable defects, and nevertheless contracts to buy it, must be understood to agree to take it as he knew that he would have to take it, and to that extent to have waived his right to object. If then, as the argument runs, he must be deemed to have known of all registered incumbrances from the time of their registration, he must be taken to have waived objection to them in so far as they are charges which the vendor has no power to remove before completion. A second limb of the argument, of which the logical strength is not nearly so evident, deals with the express provision

[10] The decision of the Court of Appeal is reported directly after that of Eve J.
[11] R. Ainscough, 51 L.Q.R. at pp. 383, 385; Emmet on *Title*, Vol. 1, p. 4.

about freedom from incumbrances. The learned judge said, after quoting the language of section 198:

> "By virtue of that section I think that both parties must be deemed to have contracted with actual notice of the existence of this resolution.
>
> "I agree that the authorities cited by Mr. Topham establish this, that a vendor who has contracted to sell free from incumbrances cannot adduce evidence to prove the purchaser's knowledge of a particular incumbrance and assert a right to the specific performance of the contract subject to that incumbrance, but this is because the reception of such evidence would be the admission of oral evidence to contradict and vary the terms of the written contract. This vendor is not driven to any such extremity. She has only to point to the section I have just read to show that when the contract was entered into vendor and purchaser must alike be deemed to have known of the existence of the incumbrance which the purchaser insists on as a good ground for avoiding the contract.
>
> "If this resolution, contrary to the conclusion I have arrived at, is an incumbrance affecting the land, it is in my opinion an incumbrance of which the purchaser had notice and of a nature which precludes her from now refusing to complete the purchase." [12]

This passage, so general and positive in its terms, seems to say quite clearly that a purchaser under an open contract will be bound to accept any genuine incumbrance of the irremovable kind (*e.g.*, a restrictive covenant made since 1925) if it was registered before contract, and it is left very doubtful how far he can protect himself against registered incumbrances by the common forms of provision for a clear title. It is, therefore, not surprising that this part of the decision has attracted attention and caused uneasiness, particularly among solicitors. One firm, in a letter to *The Law Journal*, said that they could scarcely think that the judge could have intended to make it necessary to search registers before contract, since this was a startling interpretation of section 198.[13] "This is so revolutionary," commented the learned editor, Mr. Lightwood, "that it is natural to assume that the decision was due to the particular facts of the case, and is not of general application, and no doubt this is so." [14] But the judge's reasoning,

[12] [1927] 2 Ch. at p. 387.

[13] 64 L.J.N. (1927) p. 22. There is a short discussion of this "serious and rather complex problem" by S. J. Bailey in 10 C.L.J. 241, 248.

[14] *Ibid.*, at p. 26. *Cf.* George, *Sale of Land*, p. 63, who says "Although in *Re Forsey and Hollebone's Contract* it was suggested that no matter need be disclosed which is the subject of registration as a local land charge, the decision

condensed though it is, does not seem to admit of any restriction to particular facts, or to particular types of land charge: it is founded upon the language of section 198, which applies to all registered land charges, whether local or otherwise. Accordingly, the Council of the Law Society advised solicitors to make additional searches before contract, both in the central and local registers, as well as at the usual time before completion.[15] This advice is endorsed, though with some criticism of detail, in Emmet on *Title*, where the point is discussed at some length, and it is suggested that section 198 should be amended.[16] One difficulty about search before contract, quite apart from its practical inconvenience, is, of course, that in the case of the Land Charges Register registration is effected against the name of the estate owner for the time being[17]; but the purchaser does not necessarily know the names of all the estate owners since 1925 against whom he must search, and ignorance is no shield against section 198.[18] Nor, before there is a contract, has the purchaser any right to call upon the vendor to disclose particulars which will enable him to make an effective search. And in any case where there are limitations of time and space, as, for example, at an auction sale, advice to make a pre-contract search is often inapposite.[19] To make a rule of such a procedure is to turn the regular practice of conveyancing upside down.

Nevertheless, since it is possible to search the register of local land charges (these are registered against the land rather than against the estate owner[20]), and since also there are now so many

has only been accepted by conveyancers as authority for the narrower proposition that town planning schemes and resolutions therefor need not be disclosed."

15 *Law Society's Gazette*, May, 1947, p. 97.

16 13th ed., 149, pp. 2–4.

17 Land Charges Rules, 1925, rr. 2, 4, 5, 6. As explained below, this problem does not present itself in the case of local land charges.

18 *Cf. White* v. *Bijou Mansions, Ltd.* [1937] Ch. 610, 620–1, a decision on the corresponding provision of the Land Registration Act, 1925, s. 50 (2); affirmed on appeal [1938] Ch. 351.

19 See S. J. Bailey, 10 C.L.J. 241, 248. In a note in 44 L.Q.R. 18, which is the only complacent notice of the case I have found, H. P. wrote: "Obviously the appropriate course is to make the necessary searches at the Land Registry and Local Land Charges Registry before entering into the contract." But the difficulties of this course are not mentioned. The author's further suggestion that the parties are at liberty to contract out of s. 198 is, it is submitted, untenable; although a similar result could no doubt be achieved by an express provision that the purchaser might rescind if registered incumbrances existed. The suggestion that s. 43 of the Law of Property Act, 1925, has no proper scope is also difficult to understand; the section applies in any event to *removable* incumbrances, *e.g.*, mortgages or rentcharges, which in the absence of express provision to the contrary a purchaser is always entitled to have discharged by the vendor. A similar criticism may be made of the final passage of the note by J. M. L. in 64 L.J.N. 26, already referred to, where s. 43 is apparently misquoted as s. 42.

20 Local Land Charges Rules, 1934.

statutory provisions affecting land which appear to fall outside the definition of "incumbrances," [21] solicitors have felt obliged both to make local searches and to request local authorities to answer a regular list of interrogatories,[22] all this before contract. Many solicitors also feel that they must follow the advice of the Council of the Law Society and search the Central Register against the vendor and any other names known to them, although, of course, a fuller search will have to be made before completion. Thus the traditional procedure of leaping before looking is being put into reverse. All this inconvenience is attributable to the various points decided in *Re Forsey and Hollebone's Contract*; but this article is concerned only with the more limited problems arising out of registration, and not with the wider problem that there are now far more disagreeable incidents to land than the term "incumbrances" can comprise.

It is proposed to attack Eve J.'s position at its foundations. But in order to prepare the way for this it is necessary to give a short account of the doctrine of waiver, on which section 198 is held to have had such peculiar repercussions. This long established doctrine is founded on the rule of common sense that a purchaser cannot claim to be given what he has known from the beginning that he cannot get. It qualifies the more general rule that a purchaser may demand a title entirely free from incumbrances or restrictions, except in so far as the contract provides otherwise. In this department the general rule is *caveat vendor*, since unless the vendor covers himself in the contract, the purchaser will be entitled to rescind before completion if any incumbrance or other defect appears on the title.[23] But if before contracting the purchaser knows of a restrictive covenant, for example, which it stands to reason that the vendor has himself no power to discharge, the purchaser by his very act of contracting has waived the right which the contract would otherwise give him to object [24]; for it would be frivolous for him to plead that he made the contract only for the purpose of rescinding it later, and the only other possibility is that he should take the property in the only form in which the vendor had power to give it to him, *viz.*, subject to

[21] For example potential liabilities for contravention of the Town and Country Planning Act, 1947, or for making up of private roads under the Private Street Works Act, 1892, or a proposal for requisition which is not yet effective (*cf. Re Winslow Hall Estates Co.* [1941] Ch. 503 and *James Macara, Ltd.* v. *Barclay* [1945] Ch. 148).

[22] See Emmet on *Title*, 13th ed., Vol. 1, pp. 4–5, 574, and *The Conveyancer*, Vol. 17, p. 349.

[23] See footnote 4, above.

[24] *Ogilvie* v. *Foljambe* (1817) 3 Mer. 57, 64; *Re Gloag and Miller's Contract* (1883) 23 Ch.D. 320; *cf. Ellis* v. *Rogers* (1885) 29 Ch.D. 661; *McGrory* v. *Alderdale Estate Co., Ltd.* [1918] A.C. 503.

the covenant. That is where the contract says nothing as to the title. But if the contract provides that the sale shall be "free from incumbrances," or that "a good marketable title" shall be shown, or something similar, the case is different. For the act of making such a contract, with an express stipulation for a clear title, cannot by any exercise of the imagination be construed as an act which waives the right to such a title. The purchaser is, in effect, stipulating that the vendor shall find some means of removing any kind of incumbrance, however difficult that may be.[25] Although, therefore, the express provision does no more than state what would otherwise be implied, it is valuable as rebutting any suggestion of waiver, and as ruling out any dispute as to what the purchaser did or did not know when he made the contract.[26]

Two judicial statements of these principles may be cited, partly for the sake of illustration and partly for the sake of contrast. One is taken from a judgment of Fry J., and the other from a speech of Lord Finlay L.C. Fry J. said:

> "In my view the law . . . stands in this way: When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor before the execution of the contract said to the purchaser, I cannot make out a perfect title to the property, that notice would repel the purchaser's right to require a good title to be shown. But, if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he would still be entitled to insist on a good title."[27]

Similarly Lord Finlay L.C. said:

> "The law is clear that, if there is a written agreement of sale which expressly provides that a good title is to be made, it is not open to the vendor to prove that at the time of the contract the purchaser knew of a defect in the title for the purpose of leading to the inference that a good title was not to be shown in that particular. This would be to vary a written contract by parol evidence. But, if the contract is open, the obligation which the law would import into it to

[25] *Cato* v. *Thompson* (1882) 9 Q.B.D. 616, 620 (Jessel, M.R.).
[26] *Ibid.*
[27] *Re Gloag and Miller's Contract* (1883) 23 Ch.D. 320, 327.

> make a good title in every respect may be rebutted by proving that the purchaser entered into the contract with knowledge of certain defects in the title. The inference in such a case is that he was content to take a title less complete than that which the law would otherwise have given him by implication." [28]

At one point, however, these authorities are inconsistent. It is quite clear from the remainder of Fry J.'s judgment that, following earlier authorities,[29] he regarded the question at issue as one of waiver. But Lord Finlay seems to have regarded it as one of evidence, *i.e.*, as an example of the rule that a contract required to be in writing may not be varied by oral agreement. There are precedents for this too,[30] and it has become somewhat entangled with the more intelligible rules based on waiver. It will be remembered that the rule was treated as one of evidence by Eve J. in *Re Forsey and Hollebone's Contract*, and that this aspect of it was crucial to the part of his argument which deprived the purchaser of the benefit of his express stipulation for a clear title.

It is submitted that the true basis of the doctrine is waiver, not evidence; and that this can be demonstrated from one of its corollaries which was in issue before Fry J., but not in any of the cases where the rule of evidence was referred to. Just as the *implied* right to a good title can be modified by the purchaser's act of contracting with *prior* knowledge of an irremovable defect, so even an *express* right to a good title may be partially waived if the purchaser, having *subsequently* discovered such a defect, then does some act which indicates an intention to proceed rather than to rescind. Taking possession may well be such an act, or remaining in possession and carrying out alterations, or other significant acts of ownership. In the case before Fry J. the sale was "subject to delivery of valid title," which the learned judge held to be an express provision for an absolutely good title, irrespective of the purchaser's prior knowledge. The purchaser was let into possession immediately after the contract, but was later informed that the vendor could make title only subject to certain restrictive conditions. The purchaser nevertheless continued in possession and spent over £500 in making alterations to the house. Fry J. said:

[28] *McGrory* v. *Alderdale Estate Co., Ltd.* [1918] A.C. 503, 508.

[29] *Ogilvie* v. *Foljambe* (1817) 3 Mer. 57, 64; *McMurray* v. *Spicer* (1868) L.R. 5 Eq. 527, 542.

[30] In *Ogilvie* v. *Foljambe* (above) the "oral evidence" doctrine appears to have been put forward by counsel, but it was brushed aside by Sir W. Grant, M.R., at pp. 63–64. In *Cato* v. *Thompson* (above, footnote 25) it was favoured by Lindley L.J., and by Lopes J. (at p. 620), but it was not mentioned by Jessel M.R.

> "These appear to me to be very strong acts on the part of the purchaser, knowing what he did as to the existence of conditions restricting the use of the land, and I think they bring the case within the earlier authorities, which show that, when a purchaser knows of the existence of conditions or circumstances affecting the title to the property, and over which the vendor has no control, and he notwithstanding thinks fit to take possession of the property, or to remain in possession and to make structural alterations in it, he waives, not his right to require a title to the property to be shown, but his right to insist on the particular irremovable objections of which he had knowledge before he took possession." [31]

These refinements of the doctrine are plainly inconsistent with any idea that it rests on the rule which excludes oral evidence; for these are cases where the contract provides in black and white for an unqualified title, and the subsequent acts of waiver must, of course, be proved by oral evidence in most cases. In fact the question is not whether there has been any variation by agreement, but whether there has at any stage been an act which in the light of the surrounding facts must be interpreted as a unilateral waiver by the purchaser of part of his rights. But since variation and waiver are notoriously difficult to distinguish,[32] and since the legal justification for enforcing a voluntary waiver has been highly obscure until quite recent times,[32] it is not surprising that judges have sought shelter behind the more familiar rules as to oral evidence where these have happened to fit the facts. But at any rate since the decision of the House of Lords in *Hughes* v. *Metropolitan Ry.*[33] in 1877 the concept of waiver may be said to have found its feet as a principle of equity; and so far from distrusting it as their predecessors were inclined to do, modern judges have exploited it and turned to advantage its emancipation from the technicalities of estoppel at common law.[34] It seems legitimate to assume that the doctrine of waiver as between vendor and purchaser of land, which so many Chancery judges have explained and applied, now falls into place as a part of the general principle that persons who represent that they will not enforce their rights will not be allowed to do so where this would be inequitable.

This is perhaps the place to mention one other vicissitude which

31 *Re Gloag and Miller's Contract* (1883) 23 Ch.D. 320, 328–29. The "earlier authorities" referred to by Fry J. will be found in Williams, *Vendor and Purchaser*, 4th ed., pp. 227–29, where the cases are collected.

32 The difficulties are well explained in Cheshire and Fifoot, *Law of Contract*, 3rd ed., pp. 449–51. They are expounded in more detail by the same learned authors in the second part of their article in 63 L.Q.R. 289.

33 (1877) 2 App.Cas. 439. See the article last referred to at pp. 287–8, 299–300.

34 See again the article above referred to, and also J. F. Wilson in 67 L.Q.R. 330.

has befallen the doctrine of waiver in cases of vendor and purchaser. At one time, before the courts had accustomed themselves to turning a blind eye to the technical obstacles to enforcing waivers, it was sometimes said that the purchaser's right to a clear title was a collateral right given by the law rather than an implied term of the contract; that waiver resulted from "notice" of irremovable incumbrances, and that the waiver operated "by matter of notice and not of contract."[35] Later judges have been careful not to commit themselves to approval of this notion,[36] and it is probably safe to say that the better opinion is that the right does depend upon an implied term.[37] The report shows that the Vice-Chancellor who invented the "collateral right" had the rule against oral evidence in mind[38]; and it is easy to guess that he was searching for some way round the objection that a *contractual* right could not be varied without writing and without an independent consideration. Therefore he sought refuge in a hypothetical right given not by the contract but by the general law, and apparently he attributed the waiver of such a right to the "doctrine of notice," so familiar in his court. No such shifts are any longer necessary, since the courts have subsequently recognised waivers as valid in their own right. But whether the equitable doctrine of notice has anything to do with the subject is a matter to which we shall have to recur, since it was this type of "notice," in a statutory form, which Eve J. held to have such a profound effect on the contract in 1927.

[35] These three propositions all appear in *Ogilvie* v. *Foljambe* (1817) 3 Mer. 57, 64, and were probably there invented by Sir W. Grant M.R., despite his reference to earlier authority. The first proposition (that the right to a good title is given by a rule of law rather than by an implied term) is criticised in Williams, *Vendor and Purchaser*, 4th ed., p. 35, note (*e*); on the second and third propositions Williams is confusing, for a passage on p. 227 is based wholly upon waiver, which is consistent with the doctrine of an implied term, but a subsequent (although logically anterior) passage at p. 241 is based upon notice, without mention of waiver, and this is intelligible only with the aid of the reasoning which Williams has already repudiated.

There is even a mention of "constructive notice" for this purpose in *Wealdstone U. D. C.* v. *Evershed* (1905) 69 J.P. 258, 263 (Lord Alverstone C.J.).

[36] The question was treated as open by the Court of Appeal in *Ellis* v. *Rogers* (1884) 29 Ch.D. 661, where the authorities are referred to by Cotton L.J. *Cf. McMurray* v. *Spicer* (1848) L.R. 5 Eq. 527, 541, where Malins V.-C. held the purchaser to be bound "not only by virtue of the notice but by virtue of the contract."

[37] See the opinion of Lord Finlay L.C., quoted above, pp. 95–96; Fry, *Specific Performance*, 6th ed., p. 174, citing *Doe* d. *Gray* v. *Stanion* (1836) 1 M. & W. 695, 701 (Parke B.) and *Worthington* v. *Warrington* (1848) 5 C.B. 635; Williams, *Vendor and Purchaser*, 4th ed., p. 35, note (*e*); the authority of Lord St. Leonards has also been claimed (as by Cotton L.J., see footnote 36) for the better view from the statement in Sugden, *Vendor and Purchaser*, 14th ed., p. 16; but since the opposite is positively stated at p. 337 (*cf.* also p. 345), Lord St. Leonards' testimony is contradictory.

[38] See footnote 35, above.

The way is now prepared for a return to *Re Forsey and Hollebone's Contract*, and for the question whether Eve J.'s formidable propositions are inescapable. The first proposition is that the "actual notice" effected by section 198 means that the purchaser waives objection to any registered incumbrance by agreeing to purchase the property. The second proposition is that the insertion in the contract of such words as "free from incumbrances" makes no difference. Two distinct arguments against the first proposition will be put forward. The second proposition will then be attacked separately.

First, then, it may be asked whether statutory notice can really bring about a waiver. A waiver is founded upon an inference from conduct combined with facts; if an act implies, in the light of the surrounding facts, that the person acting has decided to abandon his legal rights, that may be a waiver. The state of his mind is, of course, a relevant fact—if he *knows* that he cannot expect a clear title, and nevertheless proceeds with the purchase, the inference is plain. But if he acts altogether without knowledge of some particular matter, is it relevant that by command of Parliament he shall be deemed to have had actual notice of it? In other words, is "actual notice" a synonym for the conscious personal knowledge which is the whole basis of waiver? Fortunately there is a decision of the Court of Appeal to corroborate the natural feeling that fundamentally they are two quite different things. In *Ellis* v. *Rogers* [39] the purchaser knew, before entering into the contract, that restrictive covenants had been imposed upon the land, but he wrongly supposed that they had been extinguished when it was acquired by a railway company under statutory powers. When he later refused to proceed, having discovered that the covenants were still operative and would be binding upon him if he completed, the vendor contended that, having known of them from the beginning, he must be taken to have waived his right to object when he contracted to buy. But the Court of Appeal held the contrary, since his ignorance of the continuing effect of the covenants rebutted any waiver which might otherwise have been implied from his knowledge of them. Unquestionably he was affected by *notice*, for it was of the essence of his case that the covenants would bind him, as a purchaser with notice, if he acquired the land. But the decision shows very neatly how irrelevant this was to the question whether he could be said to have waived any rights. That depended upon his subjective state of mind, his *knowledge*; and even actual notice would not imply a waiver where

[39] (1885) 29 Ch.D. 661.

the purchaser did not consciously realise that he would be bound by the covenants if he proceeded. The remark that waiver is brought about " by matter of notice and not of contract " [40] is thus manifestly misleading, unless " knowledge " is substituted for " notice." Equally misleading, surely, is the suggestion that the " actual notice " effected by section 198 of the Law of Property Act, 1925, is any more relevant to a question of waiver than was the actual notice in *Ellis* v. *Rogers*. The truth is rather that even the most " actual " possible notice will not imply a waiver if there is wanting the vital element of the purchaser's personal awareness that he cannot expect an unencumbered title. That element is certainly wanting where the purchaser knows nothing whatever of the incumbrance, and is merely deemed to have notice of it because of its registration. Full effect can therefore be given to section 198 without creating the complications introduced by Eve J. They arise only out of the habitual equation " actual notice equals actual knowledge," combined with a forgetfulness of the principle on which the doctrine of waiver is founded. They are therefore, it is submitted, erroneous.

There is, however, an alternative line of attack, which also exploits the distinction between notice and knowledge. Registration is deemed to constitute actual *notice* to all persons for all purposes. It would be a natural construction of these last words to hold that they meant " for all purposes for which notice is material," or " for all *notice* purposes." *Notice* is a technical term drawn from the fundamental principle of equity that a purchaser with notice is bound by an equitable interest. The purposes for which notice is material, in other words, are the enforcement of equitable interests against third parties. Other purposes, such as the interpretation of a contract between first and second parties, or questions of waiver of contractual rights, are quite outside the scope of the doctrine of notice in its long settled meaning. Why should not the words of the section be held to mean that registration is deemed to constitute actual notice to all persons for all purposes where third party rights are in issue? This would be merely to say that the provision means what it was obviously designed to mean, since the Land Charges Act, 1925, under which registration is effected, is an Act concerned only with third party rights.

If it is objected that this is to restrict the meaning of the words of the Act " for all purposes," it can be answered that it is sometimes only by apt construction that such sweeping generalities can

[40] Above, p. 98.

be kept within fair bounds. It is no exaggeration to say that the court is always willing to set some limit even to the widest statutory language if by doing so absurd and unintended consequences outside the statute's true field can be avoided. For this excellent purpose miracles of interpretation can be achieved. "Void against a purchaser" can be held to mean "void at law but valid in equity"[41]; "void against a trustee in bankruptcy" can be held to mean "voidable," *i.e.*, valid in certain circumstances.[42] Appeals "from any judgment or order" may mean "from most judgments or orders, but not from all"[43]; and the words "a purchaser who did not know or had not reason to believe" may receive the extension "either by himself or by some agent whose knowledge or reason to believe is by settled law taken to be his."[44] Nor are judges deterred by stringent or intensitive language, if it is merely general. "Null and Void to all intents and purposes whatever" was held, one year after the passing of the Act, to mean "null and void against certain people, but not against others."[45] Such exercises in the art of interpretation have been performed over and over again for centuries; there is no dearth of medieval examples,[46] and from the reign of the first Elizabeth onwards the current of such decisions is thin but continuous. Plowden's classic statement was cited with approval in the House of Lords in 1890[47]:

> "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only. . . . So that they have ever been guided by the intent of the

41 *Le Neve* v. *Le Neve* (1747) 1 Ves.Sen. 64.

42 *Re Brall* [1893] 2 Q.B. 381; *Re Carter and Kenderdine's Contract* (1897) 66 L.J.Ch. 408.

43 *Cox* v. *Hakes* (1890) 15 App.Cas. 506 (refusal of right of appeal from order discharging a prisoner under a habeas corpus, despite s. 19 of the Judicature Act, 1873).

44 *Vane* v. *Vane* (1872) L.R. 8 Ch.App. 383, esp. at p. 400.

45 *Bryan* v. *Child* (1850) 5 Ex. 368, placing a restricted interpretation upon the language of the Bankrupt Law Consolidation Act, 1849, in order to limit it to its true purpose, the protection of creditors. Accordingly, it was held that an order "null and void to all intents and purposes whatever" was not void against a trader himself but only against his assignees if he later became bankrupt. See in particular the reference to earlier cases in the judgment of Rolfe B., at p. 376.

46 See the catalogue of examples collected by Plowden, 204–205.

47 *Cox* v. *Hakes* (1890) 15 App.Cas. 506, 518 (Lord Halsbury L.C.).

> Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion." [48]

The sages of the law in 1890 were prepared to do the same, and Plowden's doctrine cannot be said to be limited to times when the respective duties of judiciary and legislature were less strictly separated, and when more liberties could be taken with the language of an Act than modern judges may permit themselves.

The case in hand is probably as suitable as any could be for the invocation of this principle. The words of section 198 of the Law of Property Act, 1925, which certainly "comprehend all things in the letter," produce in our case a result which is far from "consonant to reason and good discretion" in a situation which, it is safe to surmise, lies altogether outside the scope of the section as intended by the authors of the Act.[49] On this ground too, then, it may be said that there is no compelling reason for holding Eve J.'s principal argument to be correct; and unless it is founded on ineluctable reasoning it falls by its own incongruity.

Only one difficulty now remains, namely Eve J.'s final proposition that the purchaser could not safeguard himself against what may be called an involuntary waiver of his rights by the common stipulation that the property should be sold "free from incumbrances." It will be remembered that such provisions ordinarily rule out any question of waiver being implied from the mere making of the contract, for the good reason that the express terms of the contract then contradict the waiver which might otherwise be implied from an agreement to purchase with knowledge of an irremovable incumbrance.[50] There might indeed be a waiver by some subsequent act, such as taking possession; but there cannot be one by the mere act of contracting. The purchaser ought therefore to be able to shield himself against any unsuspected results of entering into the contract by procuring a term that he shall be given a title "free from incumbrances," or "a good marketable title," or "a valid title," or by some such

[48] *Stradling* v. *Morgan* (1559) Plowd. 205.

[49] It does not seem possible to derive much help from Eve J.'s own decision in *Coles* v. *White City (Manchester) Greyhound Association, Ltd.* (1928) 45 T.L.R. 125, where he decided that registration of a town-planning resolution did not operate to give notice to a purchaser of shares in a company which owned the land affected, so as to prevent her from rescinding the contract on the ground of misrepresentation. Since she was purchasing shares, not land, the purpose was presumably not "connected with the land affected" within the meaning of s. 198. Those words are plainly capable of limited interpretation, but they are not in issue here. The Court of Appeal (*ibid.*, p. 230) once again ignored the question of registration in affirming the decision of Eve J.

[50] Above, p. 95.

expression. But Eve J. held that this principle too was turned inside out by the operation of the Land Charges Act, 1925, where the incumbrance was registered. He said that the usual rule was founded on the doctrine that oral evidence could not be given to contradict and vary the terms of the written contract; but that in the case of a registered charge the fact of registration and the language of section 198 combined to render oral evidence unnecessary, so that the purchaser could not plead the usual defence. How this accords with either logic or justice is extremely hard to understand. It is true that members of the House of Lords have before now shown favour to the rule excluding oral evidence as the mainspring of the doctrine that purchasers who have stipulated for a clear title may have what has been promised to them.[51] But reasons have already been given for suggesting that this notion is as unsound in principle as it is roundabout and obscure. It is surely absurd to say that the very act of entering into a contract can be a variation or contradiction of that contract itself, and that it is only because of a rule requiring written evidence that the " variation " cannot be proved. In truth the principle simply is that a right which would otherwise be *implied* may be held to be waived where the facts contradict the implication; but an *express* right, though it can equally well be waived at a later stage,[52] cannot be said to be waived or contradicted in any way by the very act of its own creation. This explanation has at least the merits of intelligibility and justice, for it says no more than that the purchaser shall receive what he has bargained for. In any case, of course, it is nearly always by oral evidence that acts of waiver have to be proved. But the point need not be argued further, for it was dealt with above in the general explanation of the law relating to waiver,[53] and for the reasons there given it is suggested that no rule about oral evidence has really any connection with the matter. It has crept in in the past, perhaps for understandable reasons; but in the law as it has since developed it is both redundant and mischievous. Why then did Eve J. revive it in *Re Forsey and Hollebone's Contract* as the culminating paradox of his decisions about the effect of registration? The reasoning is as curious as the result is unsatisfying. If a purchaser who agrees to buy land " free from incumbrances " is really to be held to buy it subject to any registered incumbrances, a large spanner has been thrown into the conveyancing machinery which otherwise operates so smoothly.

51 See the opinion of Lord Finlay L.C., above, pp. 95–96.
52 *Re Gloag and Miller's Contract*, above, p. 96.
53 Above, p. 97.

For the time being the profession seems very wisely to ignore these difficulties. If they are ever again forced upon the attention of the courts, they need not prove insuperable.

Summary

In the second part of his decision in *Re Forsey and Hollebone's Contract* Eve J. held that, as a consequence of the statutory notice effected by section 198 of the Law of Property Act, 1925, (i) a purchaser of land was not entitled to object to incumbrances registered at the date of the contract; and (ii) that this was true even where the contract expressly provided that the sale should be free from incumbrances.

It is submitted that both conclusions are erroneous as well as inconvenient.

The objection to conclusion (i) is that a purchaser is bound to accept incumbrances only if he has waived objection to them, and he cannot be said to show an intention to waive by acts done when the necessary knowledge was not actually in his mind; and, furthermore, section 198 is a provision about the doctrine of notice and should be confined to that subject—it has nothing to do with the construction of a contract or of acts of the parties.

The objection to conclusion (ii) is *a fortiori*, since the purchaser has expressly protected himself against incumbrances. To say that this right depends on the vendor's inability to give oral evidence of a waiver is incorrect: the right arises *ex vi contractus*, and the effect of the special stipulation about incumbrances is to rebut any allegation that the purchaser waived his right by entering into the contract with knowledge of an incumbrance. An act of waiver can always be proved by oral evidence, and its effect is a question of intention. If there is no question of waiver, there is nothing relevant which the vendor can prove by any evidence of any kind, either written or oral.

NOT DOING IS NO TRESPASS

A VIEW OF THE BOUNDARIES OF CASE

S. F. C. Milsom

This article will tell some elementary stories about the history of contract and tort. Its purpose is primarily pedagogic: although the stories are largely old, they are not very clearly explained in the books, and in particular they are done something less than justice in the standard work, Mr. Fifoot's invaluable *History and Sources of the Common Law*. Since the present aim is to explain what the stories are, rather than to prove that they are true,[1] their telling will be as little encumbered as possible with old cases and their technicalities. A secondary purpose is to set the stories together, and show how far they turn out to be the same story. It is doubtful whether even Ames, who first stated the most important of them,[2] fully realised how far the point was the same in each; and since in one guise or another it is the point of much legal history it deserves more emphasis than it has had. Finally, since Professor Plucknett freed us from the sterile delusion that case was somehow "like" trespass,[3] there has grown up a new background of ideas in which the old stories must be set afresh.

A foundation may be laid by considering the nature of trespass and case. The old theory was roughly this: that trespass always meant what it means today, that wrongs involving no direct force therefore once went without remedy, and that trespass on the case was developed under the powers of the *In Consimili Casu* clause [4] to fill the gap. The newer idea [5] began with Professor Plucknett's

[1] They may not be capable of strict proof, but only of being made more or less credible. It is, however, hoped that this article may remove some difficulties. The stories told by Ames in his *Lectures on Legal History* seem to the writer to have been there established in principle. For the others fuller references will be given.

[2] Ames, Lectures XIII and XIV (*assumpsit* and *indebitatus assumpsit*) and VII (trover).

[3] 31 Col.L.R. 778; 52 L.Q.R. 220.

[4] Stat. Westm. II, c. 24.

[5] In one form or another this has been bandied about for some time: the first published indication was in Professor Plucknett's *Concise History of the Common Law*, 4th ed., pp. 352–3. The version here outlined was formed, largely in discussions with Professor Hollond, when the writer was preparing lectures in 1949. He has not altered it since the publication of Dr. Kiralfy's book on *The Action on the Case*, and thinks that Dr. Kiralfy may agree with it as far as it goes.

perception that the statute played no part in the matter[6]; but it goes further and denies that case grew out of trespass *vi et armis* at all. The suggestion is that trespass at first meant no more than wrong or tort,[7] and that the royal courts would remedy trespasses which were not forcible as well as those which were: the only difference was that standard writs soon evolved for the wrongs which came up most often, the obvious forcible wrongs; whereas for other wrongs a writ had to be concocted on each occasion. This was reflected in the nomenclature; the standard writs for forcible wrongs were known as general trespass or common trespass, the others as special trespass. Examination of the writs will suggest that the real distinction was between acts which were obviously wrongful and those which were not[8]: it was sensible to require a defendant to answer *quare clausum fregit* without more ado; but a writ asking why he had sold his own goods in his own house needed an introduction explaining that the plaintiff had a franchise of market and had lost his market dues.[9] There was, however, no difference in nature; the one was as much a trespass as the other; and if a special writ was used when a common one would have served, nobody minded.[10] This was the position until the second half of the fourteenth century, and it is a question of words whether special trespass is or is not to be called case. The name case appeared about 1370, when the introductory part of special writs[11] began to be put to a new use; whereas before it had recited known rights like franchises, whose existence could be established by other legal processes, it might now assert new rights and duties which had no independent existence in the common law. Special trespass had protected existing rights, but case created new ones. The distinction between case and the old routine trespass now mattered; and

[6] Except, perhaps, as one more expression of the feeling that wrongs should not go unremedied.

[7] See *e.g.*, Y.B. 2 & 3 Ed. II (S.S.), 71; note 9 below. Professor Hamson drew attention to this instructive case in lectures in 1947.

[8] Historically, Lord Raymond's suggestion in *Reynolds* v. *Clarke*, 1 Str. 634, may have been nearer the mark than has been thought.

[9] Y.B. 2 & 3 Ed. II (S.S.), 71. See especially the beginning of the Note from the Record at p. 74. The record itself (C.P.40, no. 174, m.151d) shows that *vi et armis*, etc., were not, of course, alleged.

[10] Y.B. 13 & 14 Ed. III (R.S.), 134. The plaintiff claimed a franchise of estray in the manor of M., and brought his action of trespass because the defendant had taken straying foals. Shareshull J., at p. 136, said: ". . . And I tell you that, if the [plaintiff] had brought a common writ of Trespass in respect of the taking of the foals, you would have had to answer to that." It appears from the other report at p. 138 that Shareshull J. thought it might be sufficient for the plaintiff to rely on his seisin. The record (C.P.40, no. 320, m.334) shows that the writ both set out the special matter of the franchise and alleged *vi et armis* and *contra pacem*. Contrast the case in the preceding note.

[11] The *cum* clause, which might be very long.

it became fatal to use a special writ where a general one would have been appropriate.

For the present purpose, the important difference between the two theories is this. The old theory supposed, overlooking special trespass, that direct forcible injury was from the beginning the gist of trespass, which was thus always synonymous with trespass *vi et armis*; and that from trespass in that sense there was descended trespass on the case. Further, it contemplated the existence of other things on the case, for example deceit on the case as a descendant of deceit, all of which would be species of the genus case. The new theory regards trespass *vi et armis* not as the ancestor of trespass on the case but as a distinguished member of the same generation; they were all just actions in tort, and there was no special magic about those redressing direct forcible injuries. Trespass meant wrong, and trespass on the case meant an action on the case for a wrong. Trespass on the case was therefore not merely a species of case, but identical with it; and there could not be anything else on the case in the sense contemplated by the old theory.

To believers in the old theory it was clear that for a wrong to be " like " the direct force of trespass, the defendant must at least have done something. Slogans such as that used as a title for this article were thus themselves sufficiently explained, and in turn provided a sufficient explanation of the objection to using trespass on the case to remedy a nonfeasance. Mr. Fifoot's treatment [12] of the extension of *assumpsit* to cover nonfeasance is a good example. Mr. Fifoot agrees with Professor Plucknett that the statute had nothing to do with case, but substantially he accepts the old theory; while agreeing that the statute did not act as midwife, he does not doubt that case was born of trespass (meaning trespass *vi et armis*), or that there might be other things on the case such as deceit on the case. On this footing he logically represents what happened as follows. Attempts to use trespass on the case for the mere non-performance of a promise at first failed, because trespass on the case, being descended from trespass *vi et armis*, had inherited as a vestige of direct force the requirement that the defendant should have done something. These failures prompted experiments with deceit on the case, whose heredity was not similarly embarrassed. Mr. Fifoot thinks, however, that while deceit on the case played a part, Ames overstressed its claim to be the ancestor of *assumpsit*.[13] He observes that much of the later

[12] *History and Sources of the Common Law*, Chaps. 14 and 16.
[13] *Ibid.*, p. 333 and n. 12. In the historical introduction to Cheshire and Fifoot, *Law of Contract*, deceit is dismissed in a footnote; 3rd ed., p. 10, n. 4.

litigation was called trespass on the case, and explains the final step to remedying nonfeasance, prompted by commercial necessity and competition from the chancellor, by saying that "Case . . . had now become a generic form of action and the basic analogy of trespass had lost its power of attraction." [14]

None of this can be accepted by a follower of the new theory, who believes neither that there was any inheritance from trespass *vi et armis* which could have caused a difficulty, nor that deceit on the case was a separate entity which might have been looked to for a solution. What, then, was the difficulty of nonfeasance? Was it ever true that "not doing is no trespass," and if so why? Part of the answer is that this never was wholly true. The innkeeper who did not keep thieves out of his inn, so that his guest's goods were stolen, had been guilty of a nonfeasance [15]; so, even earlier, had the defendant who, being under a duty to do so, failed to repair a river wall on the Humber so that the plaintiff's land was flooded.[16] These were both liable; why was not one who made a promise and broke it? The reason surely is that in any system of law "not doing is no trespass" (meaning wrong or tort) unless there was a duty to act. A duty was imposed on the innkeeper by a mysterious custom of the realm, on the dweller near Humber by his tenure; and these duties were recited in the introductions to the writs. But one aggrieved by a broken promise could not set out any duty in trespass, and the reason is found in the cases over and over again: "This sounds in covenant." The objection is commonly regarded as a formal one, namely, that the action of covenant should have been brought; and this conveys the essential point. In fact, however, it seems that the word covenant has been overtaken by a fate similar to that of trespass. There is no reason to think that covenant meant anything except what we mean by contract, or that the action of covenant should be expressed in modern English otherwise than as the action on a contract.[17] If, then, a plaintiff brings an action of trespass on the case for failure to keep a promise, and the defendant says "Not doing is no trespass; this sounds in covenant," he is simply making the clear-sighted objection that this is not tort but contract. It does not much matter whether the unexpressed major premise is thought of as one of substantive law, "Contracts need seals," or as purely formal, "The right action here is that on a contract, in which the plaintiff would have to produce a seal": a contemporary,

[14] *History and Sources of the Common Law*, p. 337.
[15] Y.B.Pasch. 42 Ed. III, f. 11, pl. 13; 42 Lib.Ass., f. 260b, pl. 17.
[16] Y.B. 15 Ed. III (R.S.), 86.
[17] The trouble may have been caused by headings and side notes in Year Books, Abridgments, the Register, etc.

thinking in terms of the forms of action, would have seen no difference. For him the point would have been that here was a man who in making a contract had omitted, no doubt by mistake,[18] to observe the formalities, and was now unjustifiably trying to call the breach a tort and gain his remedy that way.

If that was the difficulty of nonfeasance, then the problem confronting a plaintiff who had failed to contract in the right way was formidable but rational: how plausibly to express a breach of contract as a tort? This is where the notion of deceit, already made familiar in cases of misfeasance, played its great part. The plaintiff put the matter this way: "The defendant made me a promise, in return for which I gave him something; he has failed to keep his promise, and this makes the whole transaction a deceitful wrong by means of which he has got the something from me." Nothing turns on any supposed distinction between trespass on the case and deceit on the case. Deceit on the case, written out in full, reads like this: an action of trespass (meaning tort) on the case for a wrong deceitful in nature.[19] Ames probably supposed that the two things were different, but this does not affect the validity of his conclusion about the way in which the plaintiff put his complaint. It is not a vague assertion that to break a promise is deceitful, but a definite complaint of a tort; the defendant has got something from the plaintiff by a deceitful course of conduct. Nobody can suppose that the judges were taken in by so blatant a dodge, or blame them for hesitating to accept it. They saw that if they allowed it in one hard case, they would have to redress in tort every breach of agreement in England, and subvert the law of contract as they knew it. This happened.

The proposition that consideration in contract sprang from damage in tort has been denied by Mr. Fifoot[20] and others; and there is an evident breach of continuity if it is supposed that deceit on the case was something different from trespass on the case, and that *assumpsit* for nonfeasance came into being through the agency of both. An affiliation order for consideration could not be had against every kind of tortious damage; but if it is agreed that deceit on the case was merely a kind of trespass (meaning tort) on the case, and that the importance of deceit was as a way of putting the matter, then it seems clear that what the plaintiff has been tricked out of when the transaction is expressed as a tort will be the consideration when it is viewed as a contract. The only breach

[18] Professor Thorne, in his recent lectures in Cambridge, emphasised that the early cases should be regarded as oddities, hard cases in which the normal contractual device of the conditioned bond had been omitted.

[19] See *e.g.*, Kiralfy, *The Action on the Case*, p. 94ff.

[20] *History and Sources of the Common Law*, Chap. 16.

of continuity is in the quantum of damages; and it was a circumstance essential to the working of the dodge that damages in trespass (meaning tort) were at large, so that the plaintiff was not restricted to getting back what he had parted with. Two modern rules of consideration are illuminated by this story. The case generally cited for "Past consideration is no consideration" is *Roscorla* v. *Thomas*,[21] where a warranty given after the conclusion of a sale was held invalid for want of consideration. That was in 1842. In 1490 the point was put like this[22]: "Note . . . that if a man sells something and afterwards at another place he warrants it, this warranty is void because not made on the bargain, and [the other] shall not have an action of deceit on it." In neither case had the plaintiff done anything or parted with anything on the faith of the warranty. There might be another explanation of that rule, but it is hard to imagine one for "Consideration must move from the plaintiff."[23] If Tom was suing Dick substantially in contract, but expressing the case as a tortious deceit, it was evidently no use for him to allege that Harry had been tricked out of something; if he had been, it was for Harry to sue. Consideration soon began to be discussed as a thing in itself, as the sixteenth-century reports abundantly show; but there seems no doubt that it first appeared as the vital part of the disguise when contract was dressed up as tort.

This was the most spectacular exploit of case; and it is the easiest to understand because it turns upon the familiar idea of contract. That contracts need seals is today a more intelligible proposition than its equivalent, that case ought not to be used where covenant is appropriate. The concepts of debt and detinue are less familiar, but the point of their relations with case is the same. To speak in terms of "due process" is not a bad approximation, so that the use of case where debt was appropriate would be objectionable as depriving the plaintiff of a constitutional right to wage his law. The real objection, however, was more radical; debt and tort were different kinds of thing, and confusion of the forms was unthinkable. Professor Plucknett warns us[24] against attaching too much significance to the wording of old writs, but it may help to illustrate the point. The *praecipe* writs, which include covenant, debt, and detinue, seek in terms to enforce the defendant's primary duty: he is to be told to keep his promise, pay what he owes, or hand over what he detains; and only if he does not do it is

[21] 3 Q.B. 234.
[22] Y.B.Trin. 5 Hy. VII, f. 41b, pl. 7.
[23] Ames noted the relevance of this rule; *Lectures on Legal History*, p. 145.
[24] *Concise History of the Common Law*, 4th ed., p. 344. But *cf.* p. 352.

he to be brought to court. In the *quare* writs, on the other hand, which include [25] trespass in all its forms and senses, it is assumed that the defendant's primary duty has been irrevocably broken, that there has been a wrong which can only be compensated for by damages. The problem before a plaintiff who wishes to use a *quare* writ, where on the face of it a *praecipe* would be appropriate, is thus always the same: to express what has happened as a tort, an irrevocable wrong, instead of as the mere non-performance of the positive duty which the *praecipe* writ exists to enforce.

That this was the problem in *indebitatus assumpsit*, by which case became available in place of debt, seems not to have been fully appreciated. The outline of events is well known. It was established that if one was indebted (*indebitatus*), so that the action of debt could have been used against him, and he subsequently promised (*assumpsit*) to pay, then he could be sued in *assumpsit* instead of debt. The King's Bench [26] exploited this by presuming the subsequent promise alleged by the plaintiff; whereas in the Common Pleas the truth of that allegation could be made the issue in the action.[27] *Slade's Case* [28] finally upheld the King's Bench practice, and thereafter the subsequent promise was always alleged but could never be denied; the *assumpsit* thus being presumed, the sole issue was whether the defendant was *indebitatus*, and the action of debt was overthrown.

This is a story with two points, the later of which is clear enough: it is evident that the subsequent promise was for some reason necessary to take the matter out of the sphere of debt, and that *Slade's Case* did not so much dispense with this requirement, as keep all future records straight by hallowing the lie that it was satisfied. What is not so clear is the original point. Why was the subsequent promise necessary? And why was it sufficient? Suppose that Tom had sold goods to Dick, and Dick had genuinely made a subsequent promise to pay the price, and Tom wished to sue him in *assumpsit*. The first question that arises is why Tom needed to rely on the subsequent promise at all. At the time of the sale Dick must have agreed to pay the price, so why did Tom not rely on that promise? Why did he not put the matter this way: "I parted with my goods on the faith of Dick's promise to pay, and his failure makes the transaction a deceitful wrong by which I have been tricked out of

[25] There is a sense in which the forms of trespass may almost be said to comprise the *quare* writs.

[26] The court was so called in the reign of Elizabeth I. See *e.g.*, Stat. 27 Eliz. I, c. 8: "An Act for Redresse of erronious Judgementes in the Courte commonly called The Kinges Benche."

[27] Dalison 104, pl. 45.

[28] 4 Co.Rep. 91.

my goods" ? If he had supplied the goods to Harry on the faith of Dick's promise to pay, that is substantially how he would have put his case [29]; why not here? Ames explored this question,[30] and the answer is that the same objection applied as in the case of covenant. The transaction between Tom and Dick had raised a debt; Dick had got the goods as *quid pro quo*; and Tom should seek his debt by the action of debt. Here, indeed, the objection applied with greater force because debt actually was available; whereas in the covenant situation, while covenant was the proper action, in practice it could not be used for want of a seal.

That sufficiently explains why some new element was necessary to take the matter out of the sphere of debt, but there remains a question not considered by Ames. Why was the subsequent promise sufficient for that purpose? In the litigation between Tom and Dick, how was Tom's case notionally put? To say that by the middle of the sixteenth century *assumpsit* had become a purely contractual action, and that a debt precedent was accepted as a sufficient consideration, is an unsatisfying restatement; it also supposes that *assumpsit* had forgotten its parentage with unfilial alacrity. The likely answer is that here was another and more recondite application of the deceit ploy, and that Tom put his case like this: "I had sold Dick goods and could have got my money from him by an action of debt; but because of his promise I did not do so, and have been kept out of my money for a time by his deceit." [31] Put in modern terms, the suggestion is that the subsequent promise really worked because made in consideration of forbearance of the debt. Expressed in terms of tortious deceit, it will be noticed that Tom was formally complaining of damage in being kept out of his money for a time rather than of the loss of the amount of the debt; and this explains the opening words of the fourth resolution in *Slade's Case*: "that the Plaintiff in this Action on the Case in *Assumpsit* should not recover only Damages for the special Loss (if any be) which he had, but also for the whole Debt. . . ." [32] If this is right, the allegations of deceit found in every *indebitatus* count were not mere abuse of the defendant for breaking his promise but, in principle, the assertion of a definite wrong causing definite harm; and their original purpose was to express the matter as something other than mere

[29] See *Baxter and Read's Case*, Dyer 272n. *Cf.* Y.B.Mich. 12 Hy. VIII, f. 11, pl. 3.

[30] *Lectures on Legal History*, pp. 150–1. The observations about grants should be accepted with some reserve. *Cf.* n. 24 above. See also Dalison 84, pl. 35.

[31] *Cf.* Rastell's *Entrees*, 1574 ed., f. 4, *sub. tit.* Action sur le case in lieu de action de dett; also Coke's *Entries*, f. 1, Action sur le case 1 (*Pinchon's Case*).

[32] 4 Co.Rep. 91 at 94b.

non-payment of the debt for which the action of debt properly lay.[33]

The circumvention of detinue by case was a process of which some details, especially of chronology, are in doubt[34]; but it is evident that Ames was right[35] in identifying as the original point a peculiarity of detinue itself. Detinue had developed[36] so as to enforce two distinct kinds of liability. There was first detinue on a bailment, in which the plaintiff's case was founded upon the transaction by which he had let the defendant have the thing; it was because the defendant came by it as bailee that he was bound to restore it. Secondly there was detinue otherwise than on a bailment, in which the plaintiff relied not at all upon the manner in which the defendant had come by the thing, but solely upon the fact that he was entitled[37] to it and the defendant refused to hand it over.[38] In the former the duty to restore, although only made immediate by a demand, commenced with the bailment: in the latter the duty inhered in the defendant, not when he got the thing, but when the plaintiff demanded it.[39] In the first kind the plaintiff always recited the bailment. In the second he took to counting that he had lost the thing and the defendant had found it; and a brief outline of how that probably came about must suffice for the present purpose. At first the plaintiff would really explain how the thing came into the possession (*devenit ad manus*) of the defendant, who could deny the story. Then it became evident that nothing turned on the means by which the defendant had come to have it,[40] and to prevent the case going off on an immaterial point it was settled that the defendant could not deny whatever story the plaintiff told[41]; this

33 Mr. Prichard and the present writer were each fortified by learning that the other had asked the same question and supplied the same answer. As always, the writer is indebted to Mr. Prichard for discussions.

34 It is hoped that these doubts may be cleared up by the use of record evidence; a difficulty will be to discover what happened in cases where part of the story is blanketed by a fiction.

35 *Lectures on Legal History*, Lecture VII, esp. at p. 84.

36 The development was intricate and important; what was in question was the the idea of property in chattels. The writer hopes at a later date to give some account of it.

37 Until the development was complete, one must beware of supposing the plaintiff to claim "my property." Title deeds seem to have played an important part in the story.

38 The distinction between the two kinds of liability is not confined to detinue, but appears also in debt; see *e.g.*, Y.B.Hil. 21 Hy. VI, f. 23, pl. 5 (debt against abbot for the price of goods sold to his predecessor; can the defendant wage his law?). There is a distinction between *debet* and *detinet*, which cuts across the distinction between debt for fungibles and detinue for specific goods.

39 Y.B.Pasch. 27 Hy. VIII, f. 13, pl. 35.

40 This may mark the point at which the plaintiff can speak without more ado of "my property."

41 See Y.B.Trin. 29 Ed. III, f. 38b. The defendant was one Alice Halyday, and it is a wild but not impossible conjecture that Littleton was referring to this case when he spoke of the "new found haliday"; *Malpas's* case, see next note.

confined the issue to the substantial question, did the defendant detain something the plaintiff was entitled to have? Finally, plaintiffs took to telling the standard lie of loss and finding.[42] Why? A circumstance which appears to provide a sufficient explanation is this: although the defendant could not deny the truth of the plaintiff's story, he could object to it in point of law; for example, if it ended by saying that the defendant got the thing as executor, there might be a question whether he was charged as such and should be so named in the writ.[43] The count in trover may have been attractive just because it was a simple story with no moving parts and nothing to go wrong in law; and it effectively conveyed the necessary information, that the defendant was in possession lawfully but not as bailee.

There were, then, detinue *sur bailment*, based on a duty binding the defendant because he had got the thing as he did, and detinue *sur trover*, based on a duty arising from detention after a demand. It follows that in principle, while detinue was always available against a bailee whether he still had the thing or not, there was a difficulty about using it against one who had had the thing otherwise than by bailment, but had disposed of it before the demand was made.[44] Here was a gap which the action on the case could properly fill, and this was the origin of the action for conversion.[45] To anticipate the objection that he should be using detinue, the plaintiff would explain how the defendant had come to have the thing otherwise than as his bailee. He would then make his substantive complaint, that the defendant had converted it to his own use; the word conversion, it should be noted, was used more or less literally; the goods had been consumed or disposed of. Later, instead of explaining how the thing had really come into the possession of the defendant, the plaintiff would borrow the count in trover from detinue and use that[46]; it aptly said what was necessary about the nature of the possession.

[42] See Y.B.Trin. 33 Hy. VI, f. 26b, pl. 12 (*Malpas's Case*). There is some doubt when and how long it was true that the plaintiff could allege a *devenit ad manus* generally, without saying how. See Y.B.Trin. 16 Ed. II, f. 490. In Y.B.Hil. 9 Hy. VI, f. 58, pl. 4, Paston said that the plaintiff need not say how the defendant had got the deed *because* he might have found it. This may have suggested the count in trover. Shortly after *Malpas's Case* it seems that the plaintiff again had to say how the defendant had got the thing, but to allege a trover would do; Y.B.Mich. 35 Hy. VI, f. 25b, pl. 33, at f. 27.

[43] *Cf.* Y.B.Trin. 29 Ed. III, f. 38b.

[44] Y.B.Pasch. 27 Hy. VIII, f. 13, pl. 35.

[45] Ames, *Lectures in Legal History*, Chap. 7, esp. at p. 84.

[46] The chronology of the matter is not clear. The count in trover was in use in the mid-sixteenth century; Bro.Ab., Action sur le Case 113; Dyer 121 and Benloe p. 41, pl. 73. A precedent is given in Rastell's *Entrees*, 1574 ed., (also 1566) f. 4b, 5, *sub tit.* Action sur le case in lieu de action de detinewe; the same title contains a precedent for use against a bailee of title deeds, but by

If the foregoing is right, there is no deception about this use of the action; it filled a genuine gap in the law, if a queer one. Reflection will suggest, however, that while there was no harm to a defendant in detinue if the plaintiff counted on a trover instead of on a bailment, there was clear harm if he did so in conversion, because it would mask his resort to the wrong form of action.[47] And the principal difficulty, both for contemporaries and for modern investigators, arose out of the use of the action for conversion against bailees. Ames explained why this use was inevitable.[48] Case had long been the proper action against any possessor, bailee or other, who damaged the goods without destroying them; detinue was irrelevant here, because the wrongdoer might already have restored them in their impaired state, and if not he could meet the action by doing so. It would therefore appear not altogether reasonable to deny the use of case against the bailee who destroyed or disposed of the goods, when it was available if he merely damaged them, and was also available against any other possessor who destroyed or disposed of them. Perhaps more important, the use of case to remedy damage would emphasise the difference between misdealing with the goods, which could be regarded as a tort whether it resulted in their destruction or not, and the mere failure to surrender them which was the gist of detinue.

Here was a problem which seems to have caused much difficulty, and it is by no means clear when it was solved.[49] It is, however, clear what the final solution was: principle and expediency triumphed together. It was agreed that no action but detinue

the purchaser of the land and not the bailor himself. The doubt arises over how and when the bailee could at this time be made liable in case. See further note 49 below.

47 *Contra*, Kiralfy, *The Action on the Case*, p. 113.

48 *Lectures on Legal History*, p. 84.

49 In Y.B.Hil. 18 Ed. IV, f. 23, pl. 5, Brian was against allowing the action against a bailee, but already there is talk of the property being altered. In Keilwey, 160 (2 Hy. VIII) the discussion was opened by Moore putting in terms the point made in the text above; Dr. Kiralfy (*The Action on the Case*, p. 111) says the Common Pleas held that case would lie against a bailee who sold the goods, but that was only the opinion of "divers des Justices." There are other similar dicta, *e.g.*, in *Core's Case* (28 Hy. VIII), Dyer 20 at 22b. In Bro.Ab., Action sur le Case 113 (4 Ed. VI) the count in trover was used fictitiously, and it was apparently a good plea that the plaintiff had pledged the thing to the defendant; the writer has found no evidence that the count was used when in fact there had been a bailment for some time after that, but it may have been. Rastell's only precedent which seems relevant is for use against a bailee who has been negligent, and it is based on an *assumpsit*; *Entrees*, 1574 ed., f. 9. As late as 1600, when a plaintiff actually counted a bailment and then a conversion, the defendant thought it worth while to take the point; it was overruled "for the conversion takes away the property from him," but it is interesting that it was made; *Gumbleton* v. *Grafton*, Cro.Eliz. 781. Thereafter plaintiffs seem to have been generally careful to count in trover or on a *devenit*, so avoiding what was by then a formal difficulty.

would lie against a bailee; but it was further agreed that a conversion altered the property and ended the bailment. By converting the goods the bailee ceased to be bailee, and he could properly be charged in case as if he had come to them otherwise than by delivery.[50] The effect was that, as in detinue, there would henceforward be no harm to the defendant in conversion if the plaintiff counted on a trover when in fact there had been a bailment.

So far this story is like that of *indebitatus assumpsit*, and what has happened is as innocuous[51]; there has been little change in substantive rights, but the plaintiff has gained a better remedy. There remains, however, a further step, which has had pernicious consequences. The conversion of the goods has so far been more or less literal; they have generally been consumed or sold. If a bailee or any other possessor had still got the goods, and did no more than refuse to give them up, then detinue was unquestionably the proper action; but here too a plaintiff would wish to use case, and he could cogently argue that the harm to him was the same whether the defendant had got rid of his goods or still had them. This variant of the old problem was solved by a move as ingenious as it was unfortunate. Conversion became metaphysical; it might consist in a denial of the plaintiff's title. The first step was to hold that while a mere refusal to deliver could not in itself be a conversion, it might be evidence of one[52]; and it soon appeared that a jury might find the refusal itself in the circumstances to be a conversion, as a denial of title.[53] In the situation which gave rise to it, this idea of conversion was harmless and even beneficent. Applied elsewhere, as it necessarily was, it has done mischief. A muddle over what kind of title was in question was eventually cleared up.[54] Doubts about the real nature of the wrong are with us yet, as was strikingly shown in *Oakley* v. *Lyster*.[55] Denial of title, introduced to take a detention out of the field of detinue, has grown into an unnatural tort.

The story of each of these achievements of case has turned out to have the same point. The old actions of covenant, debt, and detinue enforced positive duties, and a plaintiff who wished to use

[50] See *Gumbleton* v. *Grafton*, Cro.Eliz. 781; *Isaack* v. *Clark*, 2 Bulstrode 306, esp. *per* Dodderidge J. at p. 309.

[51] Critics of *Hollins* v. *Fowler*, L.R. 7 H.L. 757 may think that there was something to be said for the law as ordered by detinue.

[52] *Chancellor of Oxford's Case*, 10 Co.Rep. 53b at 56b, 57a; *Isaack* v. *Clark*, 2 Bulstrode 306.

[53] See Croke J. in *Isaack* v. *Clark*, 2 Bulstrode 306, at 311; *Agar* v. *Lisle*, Hobart 187, Hutton 10.

[54] See Mr. Fifoot's account of the matter, *History and Sources of the Common Law*, p. 110ff, and especially *Ward* v. *Macauley*, 4 T.R. 489 and *Gordon* v. *Harper*, 7 T.R. 9.

[55] [1931] 1 K.B. 148.

case instead had so to put the matter that he was formally complaining, not of the non-performance of the duty in question, but of a definite and irrevocable wrong: he had to find, or invent, a difference. Since, apart from their archaic procedure, the old actions were sensible, this introduction of differences was a process not without peril. Upon the whole we have been lucky. The doctrine of consideration is a small price for a law of contract better than anything covenant and debt could have given us; *indebitatus assumpsit* has been almost wholly beneficent; and conversion, though artificial, mostly works well enough.

Finally, these stories are old-fashioned enough to have a moral. The incoherence of legal history has lately been emphasised; Mr. Fifoot, for example, speaks of "the mirage of continuity."[56] Nobody believes more strongly than the present writer in the importance of misunderstanding as a means by which the law is kept related to social needs. But however much the lawyer may mistake and distort his authorities, he rarely ignores them; and if he does, his opponent is always there to bring them up. Every time a change is made, the judge who makes it must be persuaded that what he is doing is intellectually defensible; there must be a way of putting the matter which, on the existing authorities, is at least plausible. This necessity tends to perpetuate patterns in the law, which may long outlast its content. Case was poured into a mould of which the old personal actions formed part, and their traces survive in the cast. The process goes on. Today new torts, based on principles of liability and resulting mainly from the disappearance of the forms of action, are being poured into a mould made up of the old torts created by the forms; and if negligent misstatement is not a tort,[57] that is because the new tort of negligence is flowing round the older tort of deceit.

[56] *History and Sources of the Common Law*, at p. 398.
[57] *Candler* v. *Crane Christmas & Co.* [1951] 1 All E.R. 426.

RES IPSA LOQUITUR: THE AUSTRALASIAN EXPERIENCE

D. P. O'Connell *

1. The Burden of Proof

Dr. T. Ellis Lewis in this Journal in 1951 discussed the operation of the maxim *res ipsa loquitur* in relation to the burden of proof and proposed certain conclusions. So thorough was his analysis of the question that one would hesitate to intrude upon the field but for the fact that the problems posed by his article and specifically left open by the House of Lords in *Barkway's* case have recently been considered by the New Zealand Supreme Court and Court of Appeal. A frank difference of opinion on the nature of *res ipsa loquitur* manifested itself in each court, and hence no excuse is offered for advancing this discussion, which can only be complementary to that of Dr. Ellis Lewis. Advantage will be taken of the opportunity to consider the Australian contributions to the subject. There is perhaps too little awareness in England that many of the academic battles of the law are regularly being fought out in the Australian and New Zealand courts.

Res ipsa loquitur and non-*res ipsa loquitur* situations are usually distinguished as follows:

Normally the accident must not only be proved but demonstrated to be due to careless acts or omissions on the part of the defendant; in certain cases, however, the facts and circumstances of the accident are sufficient without more to raise an inference of negligence against the defendant. As Erle C.J. said in *Scott* v. *The London and St. Katherine Docks Co.*,[1] *res ipsa loquitur* affords "reasonable evidence, *in the absence of explanation* by the defendants, that the accident arose from want of care." But what "explanation" is required of the defendant? If he is clearly able to disprove negligence on his part then no problem arises. But what of the intermediate situation where he gives an explanation that is as consistent with his not having been negligent as with his having been negligent? Has he given a sufficient explanation? Is the onus that rests on him an onus of disproving negligence?

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[1] (1865) 3 H. & C. 596 at p. 601. Italics supplied.

Or is it sufficient for him to produce merely a reasonable explanation that falls short of disproof of negligence? The problem is usually posed in the courts in another form: is the principle of *res ipsa loquitur* a rule of law relating to evidence—a rule creating a legal presumption in the appropriate circumstances which can only be rebutted by a preponderance of proof, or disproof—or merely a rule of evidence affecting onus? Dr. Ellis Lewis adopts the latter view. If, he says, the evidence of the defendant, considered with the facts adduced by the plaintiff, leaves the evidence as a whole in even scales, then the defendant is entitled to judgment; the plaintiff has not proved his case. This conclusion implies that the maxim operates only in the sense that it passes the onus of going forward to the defendant, leaving the overall burden of proving negligence on the plaintiff. When the defendant has made an explanation not amounting to disproof of negligence he has discharged his onus.

Space does not permit a restatement of the English decisions analysed by Dr. Ellis Lewis. He concluded, and it is sufficient to refer to his discussion, that the language employed by Lord Simonds in *Woods* v. *Duncan* [2]—and, indeed, that of the whole House—is compatible with the view that when evidence is adduced it is taken into consideration with the inference in deciding on the whole whether the balance of probability favours the plaintiff or defendant. If this be so, *Woods* v. *Duncan* is no authority for the presumption of law theory. Nor, as Dr. Ellis Lewis has demonstrated, was the decision in *Barkway* v. *South Wales Transport Co.*[3] conclusive. In the Court of Appeal Asquith L.J.[4] advanced the presumption of law theory, while the judgments of Scott L.J.[5], and of Lord Normand [6] and Lord Porter [7] in the House of Lords, were ambiguous. Lord Radcliffe [8] would seem to have favoured the rule of evidence theory.

The two cases nevertheless form the starting point for a discussion of the decision of the New Zealand Court of Appeal in *Voice* v. *Union Steam Ship Company of New Zealand, Ltd.*[9] The plaintiff was employed by the defendant to assist in discharging

2 [1946] A.C. 401 at pp. 419, 425, 439.
3 [1948] 2 All E.R. 460; [1950] 1 All E.R. 392.
4 [1948] 2 All E.R. 460. See also Bucknill L.J. at p. 462, where he said the accident raised a "presumption of negligence." He relied on Lord Simonds' formula in *Woods* v. *Duncan*. Bucknill L.J. dissented on the ground that the defendants had not disproved negligence.
5 *Ibid.* at pp. 468–9.
6 [1950] 1 All E.R. 392 at p. 399.
7 *Ibid.* at pp. 394–5.
8 *Ibid.* at p. 403.
9 [1953] N.Z.L.R. 176.

cargo from a ship at Wellington. He was injured in the hold of the vessel by a sudden collapse of a stack of tea chests. His evidence showed that the chests were stowed behind bags of tapioca and sugar, which when removed exposed the face of the stack. Various explanations were advanced by both parties, and these will be analysed later. The trial judge directed the jury that the onus was on the defendant to satisfy it that the falling of the cases was not due to want of reasonable care, and that if it was sought to show that the cause was " pure accident arising from a latent defect in the stack " the defendant should have adduced evidence to show that such was the case. He proceeded on the assumption that the case before him fell into what Lord Normand had defined as " the intermediate position, when there is some evidence bearing on the causation of the accident." On appeal it was held *per totam curiam* that the defendant, not having elected to make the fullest disclosure of the relevant facts, which it was peculiarly within his capacity to afford, could not be heard to complain because the jury accepted the evidence tendered on behalf of the plaintiff as to the cause of the accident.

The three judges were thus agreed that *res ipsa loquitur* governed the situation; when it came to analysing the basis of the doctrine, however, they agreed to differ. Fair J. considered that " the weight of authority from *Scott's* case onwards clearly establishes the principle applied under this brocard is a rule of evidence, and not a rule of law." [10] It was so considered, he said, in *Woods* v. *Duncan* and by all the Lords in *Barkway's* case. The maxim amounts to nothing more than that a jury is entitled to infer negligence on the facts which the judge rules are sufficient to justify such an inference if the jury thinks fit to draw it. The inference may be rebutted if the defendant proves some specific cause for which he was not to blame, or proves that he was not in fact negligent; in addition, if, upon the evidence, there is a reasonable explanation which is equally consistent with the accident happening without the defendant's negligence as with its happening with his negligence, the basis of fact required to justify an inference does not exist, and the burden is shifted to the plaintiff.[11]

Gresson J. commenced by referring to the obscurity that has encompassed *res ipsa loquitur*. He seems to have been satisfied that before *Woods* v. *Duncan* the doctrine merely permitted an inference of negligence warranting a finding in the absence of

[10] At p. 184. *Davis* v. *Bunn* (1936) 56 C.L.R. 246 at p. 263; *Schaef* v. *Tingey* [1916] N.Z.L.R. 803 at p. 805; *The Kite* [1933] P. 154.
[11] Citing *The Kite* [1933] P. 154.

reasonable explanation. Since that decision, however, the principle has been elevated into something more, something tantamount to a legal presumption casting on the defendant the burden of ultimate disproof of negligence. He pointed out that Viscount Simon had said that the principle shifted the onus of proof, Lord Russell that the defendant must prove affirmatively the exercise of reasonable care, and Lord Simonds that the defendant must prove he was not negligent. Scott L.J. in *Barkway's* case, he went on, was of the like opinion, and Sellers J. in *Turner* v. *National Coal Board* [12] proceeded on the assumption that the burden of disproof lay on the defendant, and Tucker L.J. approved that view. What of the judgments in the House of Lords in *Barkway's* case?

> "Both Lord Normand and Lord Radcliffe in a passing reference to the maxim *res ipsa loquitur* spoke of it as no more than a rule of evidence, though Lord Normand was careful to add 'affecting onus.' But just what does the phrase 'a rule of evidence' mean? It seems to me none the less a rule of law, even though it relates to evidence. There is nothing in anything the learned Law Lords said to negative what had been so positively stated in the Court of Appeal: that, where *res ipsa loquitur*, there is a presumption of negligence against the defendants requiring them to prove affirmatively that they exercised all reasonable care, unless they are able to show the cause of the accident and that such cause was not due to their negligence or the negligence of those for whom they were responsible." [13]

From the authorities Gresson J. extracted the following principles:

> "(i) In every case there arises the question which is one of law—namely, whether there is any evidence on which the jury could properly find in favour of the party on whom the onus of proof lies—that is, find for the plaintiff on the basis that the defendant was negligent.
>
> (ii) If the plaintiff proves a happening of such a nature that *res ipsa loquitur*, the onus is on the defendant—that is to say, he is presumed to have been negligent.
>
> (iii) The onus of displacing this presumption of negligence will be discharged by showing either:
>
> (a) That the happening was due to something which was not negligence on the part of the defendant or those for whom he is responsible; or

[12] (1949) 65 T.L.R. 580.
[13] At pp. 188–9.

(b) That the defendant, though unable to explain the happening, exercised all reasonable care.

(iv) The onus of disproving negligence which lies on the defendant by reason of his presumptive negligence remains throughout the proceedings, so that, if the evidence is too meagre or too evenly balanced for that issue as a question of fact to be capable of determination, then, by force of the presumption, plaintiff is entitled to succeed." [14]

Gresson J.'s theory was rejected in favour of that of Fair J. by North J. in *Macdonald* v. *Pottinger* [15] decided shortly after. The facts will be discussed later and it is sufficient to note at this stage that counsel's argument, based on Gresson J.'s second principle, did not persuade the court. On the other hand, Hay J. approved and adopted Gresson J.'s formula in *Berkett and Futter* v. *Middlebrook*.[16] In that case a trailer attached to a motor car owned and operated by the defendants parted company with a car while being driven by one of the appellants, and collided with the plaintiff's car which was being driven in the opposite direction. The trailer was secured to the car by a ball and socket device. The accident occurred because the nuts became loose and fell off, thus permitting the ball to come away from the bar at the rear of the car while remaining in the socket attached to the trailer. The defendants relied on alleged defects in the device itself. It was held on appeal from the magistrates' court that the doctrine of *res ipsa loquitur* applied, and the onus on the appellants to disprove negligence had not been discharged by them; they had failed to explain precisely the cause of the accident so as to exclude the maxim's operation. This was one of the very few cases, and probably the only case, in which the evidence tendered in explanation seems to have been equally consistent with the defendant having been and not having been negligent. The cause of the accident might have been equally in the device or in the manner in which it was affixed to the car. The solution depended, therefore, upon which theory was adopted. The learned judge held that the evidence was too meagre or too evenly balanced for the issue as a question of fact to be capable of determination, and by force of the presumption plaintiff was entitled to succeed.[17]

Which theory is correct? The theory of legal presumption depends, in Gresson J.'s analysis, on the judgments in *Woods* v.

[14] At pp. 189–90.
[15] [1953] N.Z.L.R. 196.
[16] [1953] N.Z.L.R. 292.
[17] *Ibid.* at p. 294.

Duncan. That the opinions on *res ipsa loquitur* there expressed are not devoid of ambiguity is clear from the contrary interpretation of Fair J. and North J. Indeed Lord Porter would seem to have favoured the rule of evidence theory when he said the question was "not does the accident of itself point to his negligence, but is it right on the evidence as a whole to find him guilty of negligence?"[18] One is therefore forced back to first principles. What does *res ipsa loquitur* really mean? Is there any difference, save perhaps in degree, between the inference raised by the fact of a motorist driving at seventy miles an hour down Tottenham Court Road on the one hand, and bags of sugar falling from warehouses, or chests of tea from stacks in a ship's hold, on the other? Is it not just a question of the logical persuasiveness of the deduction to be made from the evidence as a whole, a matter of "common-sense" as Lord Normand said in *Barkway's* case?[19]

In each of these several situations negligence is inferred from the facts and circumstances of the accident. In the non-*res ipsa loquitur* situation it is said that the logical process involved is one of "demonstration" as distinct from "inference." But is there any such distinction? In the one case an inference is not drawn until certain possibilities which might exclude negligence, and which are matters of common knowledge, are eliminated. In the other case the appropriate inference springs from the plaintiff's stated facts without any further analysis of causes, precisely because other possibilities are, as a matter of common knowledge, already virtually eliminated. In each case the process of inference is substantially the same, being based on the ordinary experience of mankind, and in each case the inference may be rebutted by facts adduced by the defendant. Those facts may or may not amount to disproof. The plaintiff fails if, on the whole of the evidence, there is doubt about the defendant's negligence. He fails because the ultimate burden is with him, and only the onus of going forward with the defendant. At least in its genesis *res ipsa loquitur* would seem to have amounted to nothing more subtle than this.[20] Conceptually it has no independent existence in English law.[21]

[18] At p. 435. See also Atkinson J. in *Imperial Smelting Corpn.* v. *Constantine* [1940] 1 K.B. 812 at p. 828, who said "that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as equally strong, that is, equally consistent with the facts, as the inference that it was caused by negligence."

[19] At p. 399.

[20] *Cf.* the famous comment of Lord Shaw in *Ballard* v. *North British Ry.* 1923 S.C.(H.L.) 43 at p. 56; Murray C.J. in *Virgint* v. *Potts* [1929] S.A.S.R. 484 at p. 490.

[21] On this point there is by no means unanimous opinion of writers on the subject. See Dr. Ellis Lewis in the article cited; Salmond on *Torts* (11th ed., 1953),

This is not, however, to dismiss in cavalier fashion Gresson J.'s construction of the language of the Lords in *Woods* v. *Duncan*. He is by no means alone in his view. In *Lomax* v. *Reed*,[22] Abbott J. has recently in the Full Court of South Australia drawn from the judgment of Lord Simonds the proposition that *res ipsa loquitur* imposes on the defendant the burden of disproof. The judgment is the more interesting in that the tradition of Australian decisions had been in favour of the rule of evidence theory. In *Fitzpatrick* v. *Cooper*[23] in 1935 Dixon J. explained that—

> "The distinction is clear between, on the one hand, a rule of law which, as soon as given facts appear, places the legal burden of proof upon the opposite party, and, on the other hand, a presumption of fact arising from circumstances, even if the presumption be so strong that, although the legal burden of proof is unchanged, a finding that the issue was not established would be set aside as unreasonable. In the first case, the court must direct a verdict if the party upon whom the legal burden of proof is thrown fails to adduce evidence sufficient to discharge it."[24]

"The inference," said Rich J., "is not necessarily a legal inference. Its strength as an inference of fact may be a matter of degree according to circumstances."[25] Similar language was used by Starke J. in the same case, and by him, Dixon J. and Evatt J. in *Davis* v. *Bunn*.[26] In this case Evatt J. stated that the doctrine

p. 517; Dean Prosser, *Handbook of the Law of Torts* (1941), p. 293; Charlesworth on *Negligence* (2nd ed., 1947), p. 37; Phipson on *Evidence* (8th ed.), pp. 27 *et seq.*; Gahan, 1937 *The Bell Yard*, No. XV, at p. 28; Underhay in *Canadian Bar Review* 14 (1936), pp. 287–94; Paton in *ibid.*, p. 481; Seavey in *Harvard Law Review* 63 (1950), pp. 643–8; *cf.* Hodson in S.A.L.J. 62 (1945), pp. 408–13; Baker in *Australian Law Journal* 24 (1950), pp. 194–8; see du Parcq L.J. in *Easson* v. *L. N. E. Ry.* [1944] K.B. 421 at p. 425 where *res ipsa loquitur* is characterised as a figure of speech; Winfield in *Select Legal Essays* (1952), p. 57; *The Law of Tort* (4th ed., 1948), pp. 208, 411; Greer L.J. in *Langham* v. *Governors of Wellingborough School and Fryer* (1932) 101 L.J.K.B. 513 at p. 518; Lord Wright in *Grant* v. *Australian Knitting Mills* [1936] A.C. 85 at p. 101.

22 [1952] S.A.S.R. 225 at p. 229.

23 (1935) 54 C.L.R. 200.

24 *Ibid.* at p. 219.

25 *Ibid.* at p. 214. See also Lord Atkin in *McGowan* v. *Stott* (1923) 99 L.J.K.B. 357 at p. 360.

26 (1936) 56 C.L.R. 246 at pp. 267–72. See also Murray C.J. in *Virgint* v. *Potts* [1929] S.A.S.R. 484 at pp. 490–1; Isaacs J. in *Gorman* v. *Wills* (1906) 4 C.L.R. at p. 778; Cleland J. in *Amber* v. *Martin* [1938] S.A.S.R. 1; Napier C.J. in *McKenzie* v. *Hoskins* [1939] S.A.S.R. 410, where the explanation tendered by the defendant was held insufficient; Richards J. in *Collins* v. *Gottsh* [1941] S.A.S.R. 256; *Lucas* v. *Miller* (1942) 16 Workers Comp.Rep. 14. It is worth noting that the whole process of reasoning in *Grant* v. *Australian Knitting Mills* [1936] A.C. 85, seems to have been conditioned by Lord Macmillan's warning in *Donoghue* v. *Stevenson* [1932] A.C. 562 at p. 622, against applying the maxim to cases of manufacturers' liability because of the theory that mere proof of injury from a manufactured article shifts the

does not change the burden of proof that lies on the plaintiff, but merely furnishes sufficient evidence from which negligence may reasonably be inferred. Alone of the High Court judges (with the possible exception of McTiernan J. in *Fitzpatrick* v. *Cooper*, whose judgment is ambiguous [27]), Latham C.J. adhered to the legal presumption theory.[28] Professor Baker, who approves Latham C.J.'s theory, has speculated whether, after the decisions in *Woods* v. *Duncan* and *Barkway's* case there might be a change in the trend of Australian decisions.[29] A hint of such change is to be found in Abbott J.'s judgment in *Lomax* v. *Reed*, and in two as yet unreported cases in the Supreme Court of South Australia, where the legal presumption theory is regarded, on the authority of *Lomax* v. *Reed*, as binding.[30] On the other hand, Napier C.J. in *Lomax* v. *Reed* seems to have adhered to the rule of evidence theory, saying that if the defendant's evidence suggests that one explanation is as likely as the other the charge of negligence fails.[31]

2. Explanation by the Plaintiff

Is *res ipsa loquitur* excluded when the plaintiff undertakes not only to prove the accident but also assign causes to it? It is indisputable that it is excluded when all the facts are known and the causes ascertained; a jury will examine the plaintiff's evidence to determine if negligence is proved. But what if the plaintiff offers evidence that does not completely explain the accident but rather suggests several alternative causes, some of which may be consistent with the negligence of the defendant and some not? Is the defendant still called on for an explanation, so that the plaintiff succeeds if it is not forthcoming; or will the jury ascertain if the "watering down" of the plaintiff's evidence has negatived, or at least qualified, the inference? In *Voice's* case the plaintiff stated the facts, consisting in the fall of the chests. Had he left it at that *res ipsa loquitur* would undoubtedly have applied. But he went further, and his own witnesses assigned two possible explanations or hypothetical causes of the fall, namely, uneven stacking and rotten

legal onus of proof to defendant. See especially in the High Court where Evatt J. ((1933) 50 C.L.R. 387 at p. 442) applied *Chaproniere* v. *Mason* (1905) 21 T.L.R. 633, to support the inquiry on a basis of inference and not presumption. Lord Wright in Privy Council (at p. 101) said: "negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances." See the discussion by Underhay, *loc. cit.*, p. 284.

27 At p. 226.

28 (1935) 54 C.L.R. 200 at pp. 207 *et seq.*

29 *Loc. cit.*, p. 198.

30 *McKinnon* v. *Bartsch* and *Mikiolunas* v. *The Municipal Tramways Trust.* Unrep.

31 At p. 227.

dunnage. As there was no evidence of rottenness the defendant argued that the plaintiff's own evidence suggested a latent defect and that no further explanation on his part need be forthcoming. In fact, the defendant's own witnesses assigned two further causes, dislodgement by slings and activities by the plaintiff. These were also hypothetical. If the evidence was examined as a whole it might have been said that one of the several explanations was as likely as the other; the balance of the probabilities might have been regarded as fairly even; the facts would perhaps have been found to be as consistent with non-negligence as with negligence. The approach of the judges is instructive.

The logical process employed by Gresson J. was consistent with his theory of legal presumption. The evidence, he said, was so meagre that no definite conclusion could be reached, and the plaintiff succeeded only because the burden of disproof was on the defendant. To displace the presumption, he went on, the defendant's evidence would have had to amount to an explanation that excluded negligence. Although the plaintiff had assigned causes perhaps attributable to something other than the defendant's negligence—as the latent defect—he had not explained the accident, " in which case the plaintiff may fall back upon the presumption which arose from the very fact of the accident itself occurring."[32] Fair J.'s reasoning was, it is submitted, inconsistent with his rule of evidence theory. He held that the defendants, in offering the explanation that the chests could have been dislodged by being knocked loose by a sling of cargo or by the plaintiff's method of dismantling, had not offered a sufficient explanation; the scales, to employ Lord Asquith's metaphor, remained depressed in the plaintiff's favour because the defendant's evidence was insufficient to even the balance. In thus examining only the quality of the defendant's evidence, and not the evidence considered as a whole, Fair J. was in fact employing a process of reasoning not dissimilar to that of Gresson J.[33] Surely, if *res ipsa loquitur* is only a matter of inference,

[32] At p. 191. *Cf. Hannah* v. *Dalgarno* (1903) 3 N.S.W.S.R. 494 (Pring J. dissenting); *Birch* v. *The John, Ltd.* [1924] G.L.R. 32. In the *Britannia Case* (see Note 36) the cause of the accident was proved to be the breaking of the axle. In *Voice's* case the latent defect in the dunnage was not proved but was put forward only as an hypothesis. In *Marshall* v. *Russian Oil Products*, 1938 S.C. 773, it was held that the burden of proving a latent defect is on the defendant; see *Readhead* v. *Midland Ry.* (1869) L.R. 4 Q.B. 379; *Ritchie* v. *Western Scottish Motor Traction Co.*, 1935 S.L.T. 13.

[33] " Even a probable explanation which may imply the negligence of the defendant is not an answer to the doctrine," and later, the explanation of the defendant " did not amount to proof " (at p. 185). To support this proposition Fair J. relied on *Laurie* v. *Raglan Building Co., Ltd.* [1942] 1 K.B. 152. In that case Lord Greene had said that the defendant's evidence of a skid was not sufficient " the skid by itself is neutral. It may or may not be due to negligence. If, where a prima facie case of negligence arises, it is shown

it is the cogency of the evidence as a whole that should determine whether the jury are entitled to infer negligence, and that cogency may be as much weakened by the plaintiff saying too much as by the defendant advancing hypothetical causes. If Fair J. had evaluated the plaintiff's evidence he might have arrived at the same conclusion, but that is not the point; he merely accepted that evidence as raising a presumption of fact and then looked to the defendant to displace it.[34]

3. The Test of Control

Res ipsa loquitur applies, according to the classic formula of Erle C.J. "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care."[35] What degree of control is necessary to constitute "management" within this definition?[36] What of the situation where several people are engaged seriatim in the same activity, perhaps unobserved by each other, and where no vicarious relationship exists between them? Which of them, if any, has control? The difficulty of applying *res ipsa loquitur* to such a situation is evident from a reading of the judgments in *Woods* v. *Duncan*. Lord Porter[37] pointed out that Lieutenant

that the accident is due to a skid without default of the driver, the prima facie case is clearly displaced, but merely to establish the skid does not appear to me to be sufficient for that purpose" (at p. 154). This statement appears to be more consistent with the legal presumption theory, and it was so regarded by both Bucknill L.J. and Asquith L.J. in *Barkway's* case, where the latter said: "When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie* v. *Raglan Building Co., Ltd.*, where not a tyre-burst but a skid was involved" (at p. 471). See *Hammack* v. *White* (1862) 11 C.B.(N.S.) 588 at p. 599; *Wakelin* v. *L. S. W. Ry.* (1886) 12 App.Cas. 41 at p. 45, *per* Lord Halsbury L.C.; Holmes J. in *Pinney* v. *Hall* (1892) 156 Mass. 225.

[34] *Cf. Charlesworth on Negligence* (2nd ed., 1947), p. 36; *Milne* v. *Townsend* (1890) 19 R. 830, *per* Lord Adam, quoted by Lord Dunedin in *Ballard's* case.

[35] *Scott* v. *The London and St. Katherine Docks Co.* (1865) 3 H. & C. 596 at p. 601.

[36] Scrutton L.J. would seem to have been under the opinion that "exclusive" or "sole" control of the defendant is a pre-requisite: *Britannia Hygienic Laundry Co.* v. *Thornycroft* (1925) 95 L.J.K.B. 237 at p. 241. See also Goddard L.J. in *Easson* v. *L. N. E. Ry.* [1944] K. B. 421 at p. 422; Fletcher Moulton L.J. in *Wing* v. *L. G. O. C.* [1909] 2 K.B. 652 at p. 663; qualified by the C.A. in *Halliwell* v. *Venables* (1923) 99 L.J.K.B. 353 at p. 357; *cf. Gee* v. *Metropolitan Ry.* (1873) L.R. 8 Q.B. 161; *Chaproniere* v. *Mason* (1905) 21 T.L.R. 633; *Australian Agricultural Co.* v. *Newcastle* (1913) S.R.N.S.W. 667; *Edgar* v. *Shire of Seymour* (1922) V.L.R. 318.

[37] At pp. 434–5. In *Cole* v. *Trafford (No. 2)* [1918] 2 K.B. 523 at p. 528, Pickford L.J. pointed out the difficulty of applying the maxim to a case where the evidence (of breaking of imperfectly set glass) was not more consistent with the master's personal negligence than that of a co-servant. He pointed out that in *Byrne* v. *Boadle* (1863) 2 H. & C. 722, the fall of the barrel was more consistent with negligence on the part of the defendant or his servants than with any other cause, "but if it had been necessary to show that the

Woods was not in sole control. Others may have contributed by their actions to the accident. Cammell Laird's men were on board, and the naval ratings, who were the servants of the Crown and not of the defendant, might have disobeyed orders, " and a naval officer cannot be held liable for negligence merely because the ratings under him are negligent without or contrary to his orders." Therefore it was to be doubted if, in the circumstances, Lieutenant Woods could be held guilty of negligence.

The problem in question usually arises in the case of surgical operations and on this point the third recent New Zealand decision is of more than ordinary interest and significance. The plaintiff in *Macdonald* v. *Pottinger* [38] was a regular patient of the defendant, a medical practitioner, for a period of years. On March 31, 1946, he developed severe pains in his stomach, and was seen by the defendant, who formed the opinion, after examination, that the plaintiff was suffering from an acute abdominal condition which made an immediate operation necessary. The operation was carried out in a private hospital that night. In accordance with established practice it was performed by a team consisting of the defendant, an assistant surgeon, an anaesthetist, and a theatre sister. It was discovered two years later on further operation that forceps had been left in the body, and action was taken against the surgeon. On a motion for new trial before North J. it was argued that the judge had misdirected the jury in failing to direct their attention to the principle of *res ipsa loquitur*.

The only real guidance available to the court was the unsatisfactory decision of the English Court of Appeal in *Mahon* v. *Osborne* [39] in which there was a conflict of opinion on the bench concerning the applicability of the doctrine of *res ipsa loquitur* to surgical operations. In that case a swab had been left in the patient's body. Mackinnon L.J.[40] and Goddard L.J. were of the opinion that the doctrine of *res ipsa loquitur* applied in a general way. The latter said:—

> " As it is the task of the surgeon to put swabs in, so it is his task to take them out, and in that task he must use that

barrel fell by the personal negligence of the defendant I do not think the mere fact of the accident would have been evidence of such negligence " (at p. 529). See also Scott L.J. in *Barkway's Case* [1948] 2 All E.R. at p. 469.

[38] [1953] N.Z.L.R. 196.

[39] [1939] 2 K.B. 14. The court was agreed that the trial judge's direction was insufficient and a new trial was ordered. *Res ipsa loquitur* was thus not essential.

[40] " The plaintiff, having no means of knowing what happened in the theatre, was in the position of being able to rely on the maxim *res ipsa loquitur* so as to say that some one or more of these five must have been negligent. . . . But it was for the plaintiff to establish her case against either or both ": at p. 38. *Cf. James* v. *Dunlop*, unreported. See B.M.J., April 25, 1931, p. 730.

> standard of care which is reasonable in the circumstances and that must depend on the evidence. If, on the whole of the evidence, it is shown that he did not use that standard of care, he cannot absolve himself if a mistake is made, by saying 'I relied on the nurse.'" In the case of a swab left in the body, Goddard L.J. went on to imply, there is an inference that the surgeon did not use that standard of care. "He is therefore called on for an explanation, that is, he is called on to show not necessarily why he missed it but that he exercised due care to prevent it being left there." [41]

On the other hand, Scott L.J. questioned the whole basis of the applicability of the doctrine. In dealing with the responsibility of the surgeon he said, there is the need—

> "on the one hand, of enforcing a high standard of care in the surgeon against the grave danger of an overlooked swab, and, on the other, of protecting the surgeon from the risk of condemnation for actionable want of care where he has in reality been doing his best for the patient, but has, under the urgent need of closing the operation as quickly as possible in the presence of other dangers to the patient, made a slip of memory, perhaps through a failure unrealised by him of a mechanical precaution like the swab clip. Whether that slip amounts to negligence or not may be a difficult question. The important principle is that a decision of actionable want of care cannot justly be reached without taking due account of all the circumstances of the particular operation, and the legal standard of care cannot be set higher than that of the ordinarily good and careful practitioner in those circumstances." [42]

In the case in question it was the duty of the nurses to count swabs, and report to the surgeon whether they were accounted for. The theatre sister's count was wrong. If *res ipsa loquitur* applied, the plaintiff, having proved the facts, would be entitled to ask for judgment unless the surgeon gave evidence describing the operation. That, Scott L.J. suggested, could not be the situation in every case. Considerations of urgency, experience of the team, limits of discretion, all had to be taken into account. How could a judge have sufficient knowledge of surgical operations to draw an inference from "the ordinary course of things" in a complicated abdominal operation? [43] In reality *Mahon* v. *Osborne* did not raise a question of *res ipsa loquitur* at all. The judgment of Goddard L.J. was directed to the ambit of duty of a surgeon. The difference between

[41] At pp. 47, 50.
[42] At pp. 16–17.
[43] At p. 23.

him and Scott L.J. was no more than that between a judge who says "X owes in these circumstances a duty to Y," and one who dissents on that point. The plaintiff in *Macdonald* v. *Pottinger* sought to use Goddard L.J.'s proposition on the assignment of duties of care to answer the quite different question: does *res ipsa loquitur* obviate the necessity of identifying which of several people owed a duty of care which he broke?

The patient will naturally adopt this attitude: "This accident could not have happened without negligence on someone's part; I cannot be expected to know which member of the team was negligent; I relied entirely on the surgeon; it is up to him to explain any negligence on his part." This is a persuasive argument because a plaintiff, if he were not entitled to rely on inference, would be on the horns of a dilemma. If he sued the surgeon and could not prove, as is most likely the case, negligence on his part he would fail; if he did not sue the surgeon he must identify the member of the team who was responsible, a difficult undertaking when perhaps several members are inserting and extracting and counting swabs and forceps, and the patient is unconscious; he could not sue all jointly because they are not joint tortfeasors. In *Macdonald* v. *Pottinger* the expert evidence showed that forceps were inserted at several stages of the operation by both surgeon and assistant surgeon, that their presence in the abdominal cavity was due to accident or slip; that it was the duty of the theatre sister to count the instruments. Was the surgeon negligent in not finding and withdrawing the forceps, or was the sister negligent in miscounting? North J. found it impossible to follow any opinion save that of Scott L.J. The question of legal responsibility, he found, "lay among" the defendant, the assistant surgeon, and the theatre sister. The defendant was not responsible for the negligence of the members of the team, but only for his own negligence. At the same time, being the supreme head, he had special duties and responsibilities arising out of that situation. The existence of the forceps in the body might raise an inference of negligence against someone, but against whom? The most that Mackinnon L.J. and Goddard L.J. could have meant was that *res ipsa loquitur* applies in the same sense that one or more of the team was negligent. If the plaintiff elects to sue only the surgeon he must prove that the person he sues is the negligent one.[44]

On the rule of evidence theory the decision would seem to be sound. *Res ipsa loquitur* applies in a surgical operation only in the

[44] In *Mahon* v. *Osborne*, Scott L.J. asked "against which defendant, surgeon or theatre sister, did the presumption arise?" That, he suggested, implied proof of negligence against one or other.

sense that an inference of negligence may arise when supported by a sufficient number of objective facts, and it is still necessary to identify the negligent person. This amounts to having to prove negligence. The only difference between the ordinary *res ipsa loquitur* situation and that where several persons are concerned in the same activity is that the inference of negligence in the latter case will prevail only when it attaches itself to the defendant or his servants, and that may involve proving more than otherwise would be necessary to support the inference. Can this be reconciled with the decision of the Court of Appeal in *Cassidy* v. *Ministry of Health*?[45] In that case a patient undergoing post-operational treatment at a hospital was injured while under the care of the operating surgeon, who was full-time assistant medical officer of the hospital, the house surgeon and the nursing staff. The patient sued the hospital. An inference of negligence arose out of the fact of injury, and it was impossible to identify the member of the hospital staff who was at fault. It was not, however, necessary to do so, and the inference could prevail because a relationship of master and servant existed between the defendant and its staff. The situation was thus properly characterised by the Court of Appeal as one where *res ipsa loquitur*,[46] precisely because the question of identification was irrelevant. The situation in *Macdonald* v. *Pottinger* was different. To apply to the consulting surgeon the doctrine of *res ipsa loquitur* would in effect be to create a relationship of vicarious liability where in law none exists.[47] Where the injury is clearly not the result of group action the defendant must be identified as the person having the exclusive control or " management " at the appropriate time of the thing causing the injury, and not merely having the " management " in the general sense

[45] [1951] 2 K.B. 343.

[46] In 1909 it had been held in *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K.B. 820, that in the operating theatre nurses ceased to be servants of the hospital while they were subject to the directions of the operating surgeon, who was not a house surgeon. On the other hand the Court of Appeal in 1942 in *Gold* v. *Essex County Council* [1942] 2 K.B. 293, held that a hospital authority owed to a patient a duty to nurse him properly, and was liable for the negligence of a radiographer on its staff. The position of a house surgeon was left open until *Collins* v. *Hertfordshire County Council* [1947] K.B. 598. It is unnecessary to explore the connection between these decisions and the concept of the welfare State. A council is rather more susceptible to financial attack than a cottage hospital. In *Cassidy's* case, Denning L.J. proposed the general principle that hospital authorities are under an obligation to use reasonable care, whence it follows that they cannot rid themselves of that obligation by delegating it to someone else, even to a consulting surgeon employed for a specific operation.

[47] *Morris* v. *Winsbury-White* [1937] 4 All E.R. 494; *Van Wyk* v. *Lewis* (1924) App.D.(S.Af.) 438 at p. 448; *Ingram* v. *Fitzgerald* [1936] N.Z.L.R. 905, where it was held that the theatre sister was not the servant of the operating surgeon, nor in a position analogous to that of a servant: *Paton* v. *Parker* (1941) 65 C.L.R. 187.

of directing a team over whose actual activities he has imperfect control.[48]

From this discussion the following principles may be extracted, supplementary to those of Dr. Ellis Lewis:

1. That the ultimate proof of negligence is on the plaintiff.
2. That in the appropriate circumstances mere presentation of the facts suffices to raise an inference of negligence so that the onus of going forward with the evidence passes to the defendant, the ultimate burden remaining with the plaintiff.
3. That if the plaintiff explains the whole accident he will succeed only if a jury could reasonably infer negligence.
4. That if he merely gives evidence assigning hypothetical causes negligence will be inferred according to the weight of the evidence. A prima facie case may be strengthened or weakened by such evidence.
5. That if the defendant gives evidence and assigns hypothetical causes without actually disproving negligence, the situation is the same. The evidence as a whole is to be weighed and the reasonable inference drawn.
6. That if several persons, not vicariously associated, are concerned in the same activity, and the accident may have been occasioned by one or other, the appropriate inference will prevail only when it attaches to a specific person. The burden of identifying that person remains always with the plaintiff.

[48] In *Ybarra* v. *Spangard* (1944) 208 P. 2d. 445, the Californian District Court of Appeal held that the plaintiff might sue all the defendants and recover a joint judgment in a *res ipsa loquitur* situation. Professor Seavey has criticised the decision as an unwarranted extension of *res ipsa loquitur* (in *Harvard Law Review*, 63 (1950), p. 646). In *Funk* v. *Bonham* (1932) 204 Ind. 170; 185 N.E. 312, an Indiana court held that if a physician is in full control he should be prima facie liable; but in *Guell* v. *Tenney* (1928) 262 Mass. 54; 159 N.E. 451, a Massachusetts court held that if the physician and nurse have separate duties the physician cannot be held liable if there is no more evidence than that a sponge was not removed.

BOOK REVIEWS

An Introduction to the History and Records of the Court of Wards and Liveries. By H. E. Bell, Fellow of New College, Oxford. [Cambridge: at the University Press. 1953. x and 205 and (index) 10 pp. 30s. net.]

It has become fashionable for a constitutional lawyer to compare the increasingly important administrative tribunals of today with the "conciliar" courts employed by the Tudors and Stuarts. Doubtless he is thinking mainly of the Courts of Star Chamber and High Commission and of the Councils of Wales and the North, but he would probably throw in for good measure such courts as those of Augmentations, Surveyors, and Wards and Liveries.

Yet he would be wrong to do so, for these two groups of courts were not blood-brothers. The financial courts differed considerably from their notorious relatives; they were not designed to supplant or supplement the common law in any way. They have an independent claim to investigation, but it was not until last year that the longest-lived and most interesting of these courts was made the subject of a full-scale modern study. The work under review is characterised by a quite remarkable familiarity with the Wards' records and is far more than the Introduction which it modestly claims to be.

The author first traces the administration of livery and wardship from the reign of Henry VII, when it took on the character which it was to retain until their abolition in 1660. That Henry VII, rather than his son, was the real innovator is apparent from his use of commissions to keep track of descents, of the Council Learned in the Law to settle disputes, and of a new administrative hierarchy to manage and sell his wardships. In placing this department on a statutory footing in 1540, Henry VIII was to a great extent merely giving parliamentary sanction to an existing practice—a favourite device of his.

The offices of the court so created were perfectly suited to the administrative talents of the Tudor new men. The two outstanding Masters of the Wards, Paulet and Cecil, are typical of this class of royal servant. The description of the personnel of the court covers not only the masters, but the lesser officers as well. Four points stand out: the contrast between the Tudors and Stuarts in their success in choosing servants; the absence of any system of promotion; the generous opportunities for personal gain, lawful and unlawful; and, finally, the tendency of an office to run in a particular family. A striking illustration of this last characteristic was the appointment by Parliament in 1643 of a younger brother to replace a receiver-general who had followed the King to Oxford.

The chapters on the revenues of the court and on the administration of livery and wardship are not of immediate interest to the lawyer; but the latter does include a sketch of the court's use and control of juries, while an appendix to the former contains a table of the net income of the court in selected years from 1547 to 1641. This is, for one reader, perhaps the most interesting information in the book. The disappearance of feudal dues is one of the reasons often given to the recognition of a use upon a use as a trust. This statement is usually qualified by a restriction to the period after 1660, but invariably is read by undergraduates as referring to the period of *Sambach* v. *Dalston* (1634). It is interesting to note that the net income of the court in 1637 (the nearest given year) was £61,972, compared with £6,600 in 1547. These facts add weight to the suggestion that the use upon a use played a part in the development of the modern trust rather different from, and perhaps less important than, that generally supposed.

The chapter which follows will undoubtedly be the most interesting for the lawyer; it deals with the judicial business of the court. This was the outcome of two factors: first, the interest of the king, and, second, the impossibility of separating adjudication from administration. It is the fact of the king's interest which gives to the institution the appearance of a prerogative court, but it is a rather different interest from that in, say, the Star Chamber. It is an interest which differs from that of a subject in degree, not kind; the Crown's rights of wardship and livery are essentially those of a mesne lord. The procedure of the court was admittedly similar to that of Chancery and the conciliar courts in, for example, the use of interrogatories and of English as a language, but this should not obscure its true nature. The Tudor financial courts "are entitled to be called common law courts, although they were organised on the plan of Chancery, for it was from the common law side of Chancery and the revenue side of the Exchequer that they drew their inspiration." (Professor Plucknett, *Concise History*, p. 167 n. 3.)

The nature of the judicial work of the court bears out this statement. A great proportion of the cases are concerned simply with debts to the Crown—a jurisdiction expressly transferred from the Exchequer by the statute of 1540. The court might on occasion proceed on equitable principles, but in general the rule was: "En cel court choses couient estre trettes solonq' le common ley" (cited at p. 109). A case might raise difficult questions of "le common ley," more especially land law, and in such cases the presence of the judges assistant was invaluable. These were usually the chief justices and law officers, but might include all the justices, sitting in Serjeants' Inn or elsewhere.

One has only to remember that *Jane Tyrrel's* case was decided in the Court of Wards and Liveries to appreciate the effect which rulings of these judges assistant might have on the common law.

Now that it becomes clear that much of the court's work raised questions of the interpretation of the Statutes of Uses and Wills (p. 106), and of the validity of trusts and long leases (p. 52), one wonders how great was the contribution of the court to the development of English law. The pages of Coke's *First Institute* may well conceal from sight the true extent of such a contribution.

The abortive great contract of 1610 for the abolition of the feudal revenues is fully discussed. It is interesting to note that the House of Commons proposed that the annual composition should be raised out of lands held in chief (p. 140); there was no suggestion of the ultimate solution which provoked Hallam to indignation. The great contract came to nought, but the agitation continued. With the outbreak of the Civil War and with rival courts sitting in Oxford and Westminster, the end was clearly in sight. The court at Westminster had the better of the matter from the beginning; but the office of the feodary (the local inspector of wardships) in a county like Buckinghamshire must have had its embarrassments in the year 1643.

Parliament abolished the court in February, 1646, and the destruction of the Royalist court followed the capitulation of Oxford later in the same year. In 1660, the Convention Parliament confirmed the ordinance of 1646 by the Statute of Military Tenures, which substituted for the feudal revenues a yearly grant from the excise revenue of beer, ale, cider, perry and strong water. At the time, this provoked the criticism that it would not be " for the honour of England . . . to have their provisions of War and Defence arise out of so low a businesse as Ale and Beer " (cited at pp. 163–4). The rights of mesne lords were ignored.

The final chapters of the book are devoted to those physical remnants left by the dissolution of the court, its buildings and its records. The latter have suffered " almost all the dangers that may threaten records," leaving them " repellent to the user " (p. 186). The author's account of their state serves both to remind us of our debt to him for the great wealth of information drawn from them and to increase our eagerness for his promised Selden Society volume. We can at least be sure that the time-honoured form of *that* series will not be abandoned without excuse or explanation.

M. J. Prichard.

Documents and Speeches on British Commonwealth Affairs 1931–52. Edited by Professor Nicholas Mansergh, b.litt., m.a., d.phil. [London : Oxford University Press. Issued under the auspices of the Royal Institute of International Affairs. Two Volumes. 1953. xli and xvii and 1294 and (index) 14 pp. 84s. net.]

This important collection begins where the late Professor Keith's *Speeches and Documents* left off; between them the two collections now cover the whole of the period 1918–1952, which is the period

of the creation of the modern Commonwealth of independent, sovereign States. It may be said at once that Professor Mansergh has performed his task admirably. Perhaps one ought not to be surprised that the raw material of history can be so very readable; but, thanks to their very skilful selection and arrangement, these volumes, though doubtless intended primarily as source books and works of reference, are of absorbing interest. Of course, some of the stories unfolded here have in themselves many of the qualities of drama: the gentle, pathetic, irresistible erosion of Indian nationalism; or the unrelenting tragedy of Ireland, where the resolution is always rejected and the way of grievance and bitterness always embraced. Moreover, some extracts from speeches are so revealing of their authors: here are the oratory of Churchill, the hard wisdom of Smuts, the devastating humour of "Billy" Hughes, the sinister power of Gandhi; and by way of contrast, the occasional glimpse of the career politician nervously trimming his sails.

The period 1932–1952 is, of course, crowded with changes and developments of the utmost significance: the Statute of Westminster, the independence of Ceylon and India, the secession of Burma and Ireland, Abdication and War—to name only those that come immediately to mind. Reading these two volumes one gets a synoptic view of these developments as it were from the inside. Perhaps the chief impression at the end of it is the sheer pace of events in this short spell of 20 years; and also of surprise and admiration that the basic notions of the Commonwealth could be changed sufficiently rapidly to contain the events. It is an astonishing political achievement.

The accommodation of such diversity has not been without price. The question inevitably occurs how far the destruction or weakening of so many links once considered essential—appeals to the Privy Council, Nationality, the name of the Commonwealth, and even the Crown itself—can go on without final disruption. Will the eventual remainder be the quintessence of Commonwealth association or a mere historical remnant? The question is to some extent answered in a speech by the Right Hon. P. C. Gordon-Walker to the Royal Empire Society in 1950. The dilution of traditional notions has at least one positive achievement of very great importance to its credit. The Commonwealth in its present form "provides a unique bridge between Asia and the West," and so keeps together "regional groupings that might otherwise develop in isolation or might even develop in hostility to one another." And between all the independent members of the Commonwealth there is one link, which has always existed, but which today assumes greater importance: parliamentary democracy. This idea is taken up by Professor Mansergh in his introduction, where he says: "It may well be that the adoption of British political ideas and institutions by peoples of non-British extraction will be regarded by

historians as the outstanding development in the period covered by this volume."

One final impression must be mentioned; and that is the extraordinarily important part played by jargon in the cementing of the Commonwealth. The purport of the formulas of the 1926 conference is laid bare by Mr. Hughes in the Australian Parliament: "It was all things to all men. Every Prime Minister went away perfectly satisfied—Mr. Bruce because it altered nothing that affected Australia, Mr. Mackenzie King because it taught Lord Byng where he got off, and General Herzog because he was able to assure the burghers that the King of England was no longer the King of South Africa, although it was true that the King of South Africa was still the King of England." This filled Mr. Hughes with scorn. The relations between the Dominions were "an organic growth—a living force; and to attempt to confine them in a formula was dangerous folly." But in truth the formula on Mr. Hughes's own showing did not confine anything, for it meant nothing and so meant everything. Over and over again in the history of the Commonwealth the situation has been saved by phrase-making of this kind. Of course, there are deeper, more abiding and inexpressible links, but part of the genius of the situation has been the ease with which one ambiguous formula has been substituted for another. So that it almost seems that the only ultimate demand of the Commonwealth is an agreement to differ decently, springing from an affectionate contempt for words and a conviction that only action matters.

It seems almost ungenerous to offer any criticism of so splendid and stimulating a work; but perhaps two very minor criticisms may be permitted. In a work of this kind the index might have been fuller: for example, there is no mention in the index of either most-favoured-nation treatment or Imperial preference—though there is much in the text about both. And it is a matter of regret that the editor did not ask advice about the correct citation of law reports: various systems are tried, all having the merit of novelty, but "Law Courts—Appeal Cases, 1935," might be thought to be carrying an otherwise charming idiosyncrasy too far.

R. Y. J.

The Machinery of Justice in England. Second edition by R. M. Jackson, LL.D., Solicitor of the Supreme Court, Fellow of St. John's College, Cambridge, Reader in Public Law and Administration in the University of Cambridge. [Cambridge: at the University Press. 1953. ix and 353 and (tables of statutes, cases and Stationery Office publications and index) 18 pp. 30s. net.]

Students and teachers of law alike will be grateful that a new edition of this book is now on sale at a price at which, in one

Cambridge bookshop at least, the few available second-hand copies of the first edition were recently being offered—a somewhat rare but not undeserved tribute to its quality. The new edition is doubly welcome both because the book had too long been out of print, and because most important reforms have been effected since the war in certain fields where Dr. Jackson's attacks had been most formidable, especially in relation to the treatment of offenders, justices of the peace and their courts and legal aid and advice. Further, since he first wrote, the learned author has extended his own practical familiarity with much of the machinery which he so clearly describes by service, *inter alia*, in the Home Office, as Secretary of the Royal Commission on Justices of the Peace in whose report his handwriting is discernible and as a member of a County Agricultural Executive Committee. As he explains in his preface, there is a good deal of rewriting in the new edition, partly because his views on such matters as the technique of sentencing offenders, the composition of special tribunals and the desirability of creating a Ministry of Justice have changed and partly because he believes that the complacency and inertia of 1939 have been replaced by a reasonable willingness to reform the law and the administration of justice. Nevertheless, though somewhat less critical than before, his views and comments are still certain to administer a wholesome shock to anyone who may still harbour the traditional belief that the English legal system is as near to perfection as man-made institutions can attain. There is little change in the arrangement of the work, the chapter headings being Historical Introduction, Civil Jurisdiction, Criminal Jurisdiction, The Personnel of the Law, The Cost of the Law, Special Tribunals and The Outlook for Reform.

It was unfortunate that the Final Report of the Evershed Committee on Practice and Procedure in the Supreme Court (Cmd. 8878) should only have been published after this book had gone to press. Dr. Jackson's thesis (p. 18) that "We should seek for the nature of English law not in its substantive rules but in its machinery of justice" is fully supported by the second justification for their six years of labour given by that committee, namely, "It is from the practice and procedure of the courts—that is, the way in which a case is conducted, the facts discovered from examination and cross-examination and the like—that the ordinary citizen, as litigant, witness, or even spectator, obtains his experience of our legal system; and on that evidence he is likely to form his judgment on the claim commonly made by Englishmen to excellence in the administration of justice" (para. 1). In the light of its final report, Dr. Jackson would no doubt confirm his view (p. 41) that this committee has been more vigorous and radical in its approach than many former inquiries. The adoption of the committee's recommendations concerning the extension of the originating summons procedure, the introduction of an analogous

new procedure by writ, the more robust handling of the summons for directions, the relaxations of the rules for proof of documents and the prior exchange of proofs of medical and expert witnesses, would do much to remove many of the defects pointed out by Dr. Jackson. It is much to be hoped that his faith in the new atmosphere favourable to reform will be justified and that the legal profession, and especially barristers who rarely see bills of costs, will become imbued with the "new approach" urged by the committee.

The author has now abandoned the proposal in the last chapter of the former edition for the abolition of the High Court and its replacement by a system of district courts, with a central appellate court, both exercising civil and criminal jurisdiction. Though the Evershed Committee did not consider the wholesale reorganisation of the circuit system they found no evidence of a desire for the establishment of provincial centres for the trial of civil cases separately from criminal cases, and it may be suggested that a system of district courts exercising all original jurisdiction would be a reversal of the historical evolution of the "common law" system. Although the committee found much to be said for the amalgamation of the Admiralty and Commercial Courts recommended by Dr. Jackson (p. 56), yet they do not recommend the immediate break-up of the Probate, Divorce and Admiralty Division and the distribution of its jurisdiction between the other two Divisions. The primary objection is that it would then be essential to have always available in London two judges expert in admiralty matters and a further two judges expert in commercial law, whereas at present the aggregate of all such admiralty and commercial cases occupies less than one judge's judicial time. It is good to know that the present Lord Chief Justice has taken steps designed to revive the former reputation of the Commercial Court and it is to be hoped that this topic will again be reviewed if the present Royal Commission on Marriage and Divorce should recommend any alteration in divorce jurisdiction.

A system of district appellate courts, referred to at p. 76, would probably be neither desirable nor economical. The present grievance of the costly system of appeals (or the threat of them) to the Court of Appeal and thence to the House of Lords will be largely met if the Evershed Committee's proposals are adopted whereby, in actions involving an important point of law covered by a previous decision of the Court of Appeal or a question of the construction of a statute or statutory instrument, a High Court judge might authorise the parties to "leap-frog" the Court of Appeal and proceed direct to the House of Lords. If the House of Lords is to remain the ultimate appellate tribunal, steps should surely be taken to reduce the cost of appeals to that court in *all* cases notwithstanding the committee's proposals that litigants should be enabled to conduct litigation, and especially appeals to

that House, wholly at the public expense in cases where the Attorney-General certifies that a point of law of exceptional public interest is involved. Perhaps if the right to appeal to the House of Lords in civil cases were restricted in the same way as is now the case in criminal matters, and if the rule that the House is bound by its own former decisions were abolished, the desirable compromise between certainty and flexibility in the law might be more nearly attained than is at present possible. It appears that an indirect, and it is submitted regrettable, result of the creation of an Appellate Committee of the House of Lords in 1948 is that the Lord Chancellor, being naturally unable to preside over the House in its legislative and judicial functions simultaneously, has, contrary to the statement at p. 338, virtually ceased to take part in its judicial work and in that of the Judicial Committee of the Privy Council. A glance through the volumes of Appeal Cases for 1949 and 1952, and through the three volumes of the Weekly Law Reports for 1953, reveal that he took part in none of the eleven, fourteen and twenty-nine cases in the Judicial Committee reported in those years respectively, and in only one of the fourteen, two of the twenty-four and one of the seventeen cases in the House reported in those same years, though as a corollary he has been able to be more active in the field of law reform.

The chapter on criminal jurisdiction, which by its length and detail reveals the author's main field of interest, has been brought up to date by a comprehensive and accurate account of the many changes made by the Criminal Justice Act, 1948, the Justices of the Peace Act, 1949, and the Magistrates' Courts Act, 1952, though, of course, not all these provisions are yet operative. No mention is made at p. 105 of the possibility of an appeal to the House of Lords at the instance of the prosecutor under section 1 (6) of the Criminal Appeal Act, 1907, whereby the House may reverse the decision of the Court of Criminal Appeal, quashing a conviction and thus restore the conviction by the court below (*R.* v. *Ball* [1911] A.C. 47). Justices of the Peace can now obtain the new travelling and lodging allowances (p. 144). The recent pronouncement of the Lord Chief Justice (reported at 117 J.P. 807) concerning justices' clerks retiring with their justices to consider cases came too late for mention at p. 153. Dr. Jackson now considers (p. 198) that, in spite of his criticisms of the judiciary's lack of qualifications in penology, the sentencing of offenders should be left to the courts which convict them and not, as he formerly advocated, to a separate administrative body. He now regards it as more important that the sentencing organ should be independent of the executive than that the assessment of the appropriate sentence should be made by the persons who would have to carry it out, even though the latter may be the persons best qualified to assess it. Most people would probably agree with this view for the reasons which he states.

The chapter on special tribunals is of considerable interest. Most lawyers would today agree that the distinction, in Dicey's terminology, between "ordinary" law courts and special tribunals is now barren, and a matter of history and tradition. Although a county court judge is appointed and removable by the Lord Chancellor, just as a member of some special tribunal may be appointed and removable by some other minister, it is probable that the removal of a county court judge would cause far greater public interest and anxiety than the removal of the special tribunal member. Whereas we have all become accustomed to county courts and magistrates' courts as part of the scheme of things and their wide general jurisdiction affects so many of us, we tend to regard special tribunals, which are frequently reformed or replaced by others exercising substantially the same jurisdiction, as individually ephemeral though collectively permanent; comparatively few people are affected by the specialised jurisdiction of some of these tribunals and probably no one can keep abreast of all the rapid changes amongst them as class. These are human factors which may be irrational but which help to explain the disparaging attitude often adopted towards such bodies. Dr. Jackson now holds (pp. 330–1), it is submitted rightly, that it is desirable that all "justiciable" issues should be decided by law courts or independent special tribunals and that only where the issue is one of policy should the decision be entrusted to a minister since, in the latter case, "it is quite as important to provide against being ruled by judges as it is to guard against being judged by ministers." He explains the process involved in such policy decisions (pp. 317–8) and criticises those who think that it is important to know who in fact, within the ministry concerned, actually decides the matter on the ground that the decision is in form and in law that of the minister, who must in any event carry the responsibility for it. Yet is this wholly immaterial? The individual whose property or interests may be affected by some proposed scheme may have been given what has been called "the right to fulminate" at a public inquiry (at his own expense), before some representative of the department concerned. Thereafter he hears nothing further and can do nothing further until the decision, whether adverse to him or otherwise, is published, with or without reasons. Is it surprising if he feels that, during the progress of the file of papers and reports on its way to the person who in fact takes the decision, some of the urgency and importance of the matter to him may get lost in transit? Putting one's case to an agent who will report to the arbiter is not the same as putting it to that arbiter in person, however disinterested the agent. It may well be that such matters can only be effectively handled in this way but, again, should the parties affected be blamed for their very human reactions? It is a maxim of the law rigidly enforced by the courts that justice shall not only be done but shall be

manifestly seen to be done. Unpopular as it would be with administrative authorities, would it not make such decisions more readily acceptable if it were required that the report of an inspector at a public inquiry must be published and that the minister must either adopt it or else publish his reasons for refusing to do so? It is not suggested that the minister's decision should be subject to an appeal to any tribunal, but might this not make his responsibility to parliament a real one? At the present time the material upon which his exercise of that responsibility may be tested generally remains unpublished. Though the public interest must often override that of the individual and in such cases the public must not be held to ransom, why should the individual, who is often neither blameworthy nor wealthy, be left to oppose the scheme, if at all, at his own cost and, if unsuccessful, not merely suffer the inconvenience of losing his property but also sometimes, it must be admitted, receive compensation on a wholly unrealistic scale which amounts to his subsidising the public? Dr. Jackson is rightly ever conscious of the difficulties and anxieties of the small man who finds himself in the toils of the criminal law; he seems less so when such a person is caught in the meshes of administrative law.

Writing this second edition must have given the author considerable satisfaction in the knowledge that it is books such as his own that help to create the informed opinion necessary for the achievement of the reforms which he describes. The book is *sui generis* and indispensable to any student of the English legal system and now that magistrates are required to undergo a course of instruction in their duties it may be said, in modern reviewer's jargon, that for them it is a "must." The publishers and printers, too, deserve congratulation on its production; the paper, type and format are all considerably improved in this edition, the indices comprehensive and only two minor printing errors have been noticed in the whole book. It is sincerely to be hoped that it will not again be allowed to go out of print.

J. W. A. Thornely.

Salmond on the Law of Torts. Eleventh edition by R. F. V. Heuston, M.A., Fellow of Pembroke College, Oxford, of Gray's Inn and King's Inn, Dublin, Barrister-at-law; sometime Scholar of Trinity College, Dublin. [London : Sweet & Maxwell, Ltd. 1953. lx and 753 and (index) 39 pp. £2 2s.]

Lord Justice Denning's recent remark about the "morass into which the law has floundered" referred to the niceties of distinction between licensees and invitees but it is not only in the territory of occupiers of premises that the morass has an ineluctable attraction. Venturers into the various tracts of tort—duty in general, dangerous chattels, vicarious liability, remoteness—are

fortunate indeed if they can keep their heads above the mire. For twenty-one years Sir John Salmond himself acted as guide and for twenty-five years Stallybrass continued with " a measure of success which is universally acknowledged throughout the common law world." Mr. Heuston was given only a limited time in which to produce a new edition of Salmond after an interval of seven years which had seen not only a multitude of decisions but statutory changes including the Contributory Negligence Act, 1945, the Crown Proceedings Act, 1947, the Personal Injuries Act, 1948, and the Defamation Act, 1952. The task was a formidable one and had excuse been necessary much could have been excused. But Mr. Heuston has achieved a major success. This is an outstandingly good edition and, with knowledge of the difficulties of production, it is almost impossible to praise it too highly.

Salmond offered his first edition in 1907, as " a general exposition, in moderate compass, of an extensive and in some respects difficult and imperfectly developed department of our legal system." The difficulties and imperfections of the system increased with the years and in 1945 Stallybrass wrote of the problems of an academic editor of a legal textbook, who must, he thought, be torn in two directions. " He is drawn towards historical investigation on the one hand and on the other towards a teleological approach with suggestions for law reform. But I have tried to remember that Salmond's *Law of Torts* is not primarily a statement of the law as it was or as it should be but a picture of the law as it is today." It is in this tradition that Mr. Heuston has prepared the new edition and prepared it so admirably. It is, in the style of its predecessors, a constructive, calm, well-balanced and good-tempered work. There is no riding of hobby-horses or flogging of dead ones. Salmond's purpose was " to set forth the principles of the law of torts with as much precision, coherence, and system as the subject admits of, and with as much detailed consideration as is necessary to make the work one of practical utility." This purpose Mr. Heuston has clearly in mind. That this edition is some eighty pages longer than the last edition produced in comparable circumstances is inevitable for that edition appeared seventeen years ago. Many sins are committed in the name of brevity and the avoidance of them more than justifies the extra pages.

There has necessarily been a substantial amount of rewriting on some topics. The Contributory Negligence Bill could only be dealt with by a prophetic comment in the Preface in the last edition, but in this edition the section has been rewritten and contributory negligence at common law has been put into proper perspective in the light of the Act of 1945. The abolition of the doctrine of common employment has led to a recasting of the section on the master's duty to his servant. The efforts of the legislators in the Defamation Act, 1952, such as they are, have been incorporated in the chapter on defamation. A lucid and incisive analysis of

the effects of *Donoghue* v. *Stevenson* on the liability for dangerous chattels has been added. But it is in relation to the liability of an occupier of premises to his invitee that the greatest debt of gratitude is owed to Mr. Heuston. Here Mr. Heuston has uncovered the House of Lords decision in *Thomson* v. *Cremin* in 1941, a decision not reported in any series of law reports until, after its discovery by Mr. Heuston, it was given to us in [1953] 2 All E.R. at p. 1185. We now find that, in 1941, Lord Simon and Lord Wright gave unqualified approval to *Wilkinson* v. *Rea* in the Court of Appeal in the same year, and that Lord Wright observed that "the duty of the invitor towards the invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors." The Court of Appeal in *Haseldine* v. *Daw* in 1941, and in *Woodward* v. *Hastings Corporation* in 1945, were as ignorant of this as we were. There is some activity at present in the world of statutory law reform directed to the solution of the problems of the liability of an occupier to his invitees and licensees, but if this should not come to anything before the next edition of Salmond, an analysis by Mr. Heuston of the differences between the duties owed by an occupier under the *Francis* v. *Cockrell* rule, the *Gillmore* v. *L. C. C.* rule and the rule in *Indermaur* v. *Dames*, as interpreted in *London Graving Dock Co.* v. *Horton*, would be of great help. Since the preparation of the new edition of Salmond the proposition put forward by du Parcq L.J. in *Gillmore* has been further blessed by the Court of Appeal in *Bell* v. *Travco Hotels Ltd.* and the morass is close at hand.

Arrangement of material is always controversial but the reviewer has never liked the placing of the Law Reform Act, 1934, in the section on Executors and Administrators in the chapter on Parties, and of the Fatal Accidents Act, 1946, in the chapter on Injuries to Domestic and Contractual Relations some three hundred pages away. It is, perhaps, helpful if the two are taken together as in Winfield. There are inevitably some slips and misprints in this edition of Salmond, but most, if not all, of these have already been communicated to the editor. He might, however, care to consider whether the first exception to the rule in *Wood* v. *Leadbitter*, on page 277, is not so much an exception as part of the rule itself. As to the sections on injuries to servitudes in the chapter on Nuisance, the reviewer would like them retained even at the expense of a deliberate check to the "apparently limitless ambitions of the tort of negligence." The Law of Torts and the Law of Negligence are not yet synonymous.

The eleventh edition of Salmond reverts more to the pre-war style of printing and binding, it is well and attractively presented and at two guineas it is excellent value in these days of ever-increasing prices. Publishers and printers earn praise and Mr. Heuston is to be congratulated on the achievement of so much in

so short a time and at such a difficult stage in the development of the law of torts.

F. J. O.

Freedom through Law. By Robert L. Hale. Columbia University Press [London : Geoffrey Cumberlege. 1952. xvi and 591 pp. 48s. net.]

The author, a professor of economics as well as of law, is concerned with the extent to which freedom from restrictions on one's economic activities is desirable, and is secured by the courts. In Part II he deals with common law decisions, including English ones, and there is a most thorough analysis of the House of Lords conspiracy cases (55–71). Thereafter he turns in Parts III and IV to explain the relevant parts of the American constitution, and the role of the Supreme Court as interpreter. The treatment is of great interest to an English reader unversed in these matters. A conservative number of cases is handled, but the penetrating analysis and long quotations give a complete picture without recourse to the reports. The reader without experience in this sphere feels that he could face with quiet confidence such a test as that applied to Alabama voters under the Boswell Amendment (352). The struggle for equality before the law is vividly described, as it is fought out not only by negroes, but also by Jehovah's Witnesses and Chinese laundrymen. There is a reference to *Warner Brothers* v. *Nelson* (191), and it would be interesting to know the author's views of the English price restriction and restraint of trade decisions. Finally in Part V, the author considers how far a judicial body is fitted to discharge the function of securing adequate economic liberty.

R. N. G.

Books also received include the following : —

Allen, Sir C. K., *The Queen's Peace.* [Stevens & Sons. 1953. 12s. 6d.]

Boulton, W. W., *Conduct and Etiquette at the Bar.* [Butterworth & Co. 1953. 8s. 6d.]

Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals.* [Stevens & Sons. 1953. 84s.]

Cory, H., *Sukama Law and Custom.* [Oxford University Press. 1953. 18s.]

Delaume, G. R., *American-French Private International Law.* [Sweet & Maxwell. 1953. 15s.]

Denning, Sir A. T., *The Changing Law.* [Stevens & Sons. 1953. 10s.]

Drinker, H. S., *Legal Ethics.* [Oxford University Press. 1953. 32s.]

Duhamel and Smith, *De Quelques Piliers des Institutions Britanniques.* [Paris: La Vie Judiciaire. 1953. 800 frs.]

Friedman, S., *Expropriation in International Law.* [Stevens & Sons. 1953. 35s.]

Goodhart, A. L., *English Law and the Moral Law.* [Stevens & Sons. 1953. 12s. 6d.]

Graveson, R. H., *Status in the Common Law.* [Athlone Press. 1953. 18s.]

Hazard, J. N., *Law and Social Change in the U.S.S.R.* [Stevens & Sons. 1953. 25s.]

Hickson and Carter-Ruck, *The Law of Libel and Slander.* [Faber & Faber. 1953. 30s.]

Hollond, H. A., *Frederick William Maitland.* [Bernard Quaritch. 1953. 4s.].

Hueck, A., *Probleme des Mitbestimmungsrechts.* [Druck: Verlag C. F. Müller Karlsruhe. 1953.]

La Brie, F. E., *The Meaning of Income in the Law of Income Tax.* [Oxford University Press. 1953. 97s. 6d.]

Landheer and van Essen, *Fundamentals of Public International Law.* Leyden: Sijthoff's Publication Co.]

Legal Essays in honour of Arthur Moxon. [Oxford University Press. 1953. $10.00.]

Lloyd, D., *Public Policy.* [Athlone Press. 1953. 18s.]

Nussabaum, A., *American-Swiss Private International Law.* [Sweet & Maxwell. 1953. 7s. 6d.]

Orfield, L. B., *The Growth of Scandinavian Law.* [Oxford University Press. 1953. 68s.]

Pawate, I. S., *Contract and the Freedom of the Debtor in the Common Law.* [Bombay: N. M. Tripathi, Ltd. 1953. 12s. 6d.]

Shafqat, C. M., *Pakistan Constitution: an Essay.* [Lahore. 1953. Rs. 2/8.]

Shahari, M. S., *The Indian Constitution at a Glance.* [Dehli: Ranjit Printers & Publishers. 1952. 12s. 6d.]

Smith, T. B., *The Doctrine of Judicial Precedent in Scots Law.* [Edinburgh: W. Green & Sons. 1952.]

Street, H., *Governmental Liability.* [Cambridge University Press. 1953. 25s.]

Vinding Kruse, Fr., *The Right of Property*, Vol. 2. [Oxford University Press. 1953. 21s.]

Würdinger, H., *Freiheit der persönlichen Entfaltung Kartellund Wettbewerbsrecht.* [Druck: Verlag C. F. Müller Karlsruhe. 1953.]

Current Law Year Book, 1952. [Sweet & Maxwell and Stevens & Sons. 1953. 50s.]

Current Trends in State Legislation, 1952. [Michigan University Press. 1953. 60s.]

Grotius Society, Vol. 38. [Clevedon Press. 1953. 25s.]

Holmes-Laski Letters, Vols. 1 & 2. [Oxford University Press. 1953. 84s.]

Laws and Practices concerning the Conclusion of Treaties. [H.M. Stationery Office. 1953. 22s. 6d.]

Six Lectures for Justices. [The Magistrates Association. 1953.]

Selected Justiciary Cases, 1624–50, Vol. 1. [Stair Society. 1953. Subs. 21s. p.a.]

New Editions:—

A.B.C. Guide to the Practice of the Supreme Court. [37th ed. 1953. 30s.].

Bailey, S. J., *Law of Wills* [4th ed. 1953. 40s.]

Beattie, C. N., *Elements of Income Tax Law.* [2nd ed. 1953. 25s.]

Cross and Jones, *Introduction to Criminal Law.* [3rd ed. 1953. 27s. 6d.]

Cross and Jones, *Cases on Criminal Law.* [2nd ed. 1953. 25s.]

Cross, R., *Law of Wills.* [3rd ed. 1953. 6s.]

Friedmann, W., *Legal Theory.* [3rd ed. 1953. 30s.]

Geldart, *Elements of English Law.* [5th ed. 1953. 6s.]

Hanbury, H. G., *English Courts of Law.* [2nd ed. 1953. 6s.]

Hood Phillips, O., *First Book of English Law.* [2nd ed. 1953. 17s. 6d.]

James, P. S., *Introduction to English Law.* [2nd ed. 1953. 15s.]

Keir & Lawson's Cases in Constitutional Law [4th ed. 1954. 35s.]

Key & Elphinstone's Precedents in Conveyancing. [15th ed. 1953. £15 15s.]

Lee, R. W., *Introduction to Roman-Dutch Law.* [5th ed. 1953. 40s.]

McNair, Sir A. D., *The Law of the Air.* [2nd ed. 1953. 63s.]

Mann, F. A., *The Legal Aspect of Money* [2nd ed. 1953. 50s.]

Maxwell on the Interpretation of Statutes. [10th ed. 1953. 45s.]

Maxwell, M., *Guide to the Legal Profession.* [4th ed. 1953. 7s. 6d.]

Moriarty, C. C. H., *Police Law.* [12th ed. 1953. 12s. 6d.]

Newsom & Abel-Smith, *Limitation of Actions.* [3rd ed. 1953. 75s.]

Parry, Sir D. H., *Law of Succession.* [3rd ed. 1953. 35s.]

Rayden's Practice and Law in the Divorce Division. [6th ed. 1953. 84s.]

Wilshere's Criminal Procedure. [3rd ed. 1954. 22s. 6d.]

Communications concerning articles and notes should be sent to Professor S. J. Bailey, St. John's College, Cambridge. Books for review should be sent to The Cambridge Law Journal, *Squire Law Library, The Old Schools, Cambridge.*

It is regretted that the limited space available for book reviews has made it necessary to give no more than short notices of some of the works received for review.